March 24 1877
Sol General
Opinion

4-437

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 905.

THE NATIONAL BANK OF THE COMMONWEALTH OF NEW YORK CITY, PLAINTIFF IN ERROR,

vs.

THE MECHANICS' NATIONAL BANK OF TRENTON, NEW JERSEY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

9

FILED OCTOBER 27, 1876.

March 24 1877
Affirmed
Jus Swayne

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4 U. S. circuit court for the southern district of New York, in the second circuit.

Pleas before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit, at the United States court buildings in the city of New York, of the term of October, 1875, to wit, of the twenty-ninth day of February, in the year of our Lord one thousand eight hundred and seventy-six.

Witness the honorable Alexander S. Johnson, one of the judges of the said circuit court.

JOHN I. DAVENPORT,
Clerk.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered that heretofore, to wit, on the seventh day of
5 December, 1875, in October term, 1875, before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit, at the United States court buildings in the city of New York, came The Mechanics' National Bank of Trenton, by Miller, Peet & Opdyke, their attorneys, and brought into the said court, before the aforesaid judges thereof, then there, their certain declaration against The National Bank of the Commonwealth of the City of New York, being summoned, &c., of a plea of trespass on the case upon promises; which said declaration follows in these words, that is to say:

6 Circuit court of the United States for the southern district of New York, in the second circuit.

THE MECHANICS' NATIONAL BANK OF TRENTON, New Jersey,
against
THE NATIONAL BANK OF THE COMMONWEALTH of the City of New York.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The Mechanics' National Bank of Trenton, New Jersey, plaintiff in this suit, a corporation duly organized and existing under and pursuant to an act of Congress of the United States entitled "An act to provide a national currency secured by pledge of United States stocks, and to provide for the security and redemption thereof," passed February 25th,
1863, and also another act of Congress of the United States en-
7 titled "An act to provide a national currency secured by a pledge of United States bonds, and provide for the circulation and redemption thereof," passed June 3d, 1864, and the several acts amendatory thereof, by Miller, Peet & Opdyke, its attorneys, complains of the National Bank of the Commonwealth of the City of New York, the defendant in this suit, and for a long time previously to and until September 22d, 1873, a corporation duly organized and existing under and pursuant to the acts of Congress of the United States aforesaid, of a plea, that the said defendant render unto the said plaintiff the sum of five thousand three hundred and fifty-nine dollars and eighty-six cents, (5,359.86,) with interest thereon from November 20th, 1874, lawful money of the United States of America, which the defendant
8 aforesaid to the said plaintiff owes, and from the said plaintiff unjustly detains.

I. For that whereas on the twenty-second day of September, in the

year eighteen hundred and seventy-three, at the city of New York, the plaintiff herein had on deposit in said National Bank of the Commonwealth of the City of New York the sum of seventy-seven thousand five hundred and fifty-nine dollars and twelve cents, ($77,559.12,) and was entitled to immediate payment thereof upon demand.

That on the said twenty-second day of September, eighteen hundred and seventy-three, the said National Bank of the Commonwealth refused to pay its circulating notes upon demand, and was in default within the meaning of the statute in such case made and provided, namely, the aforesaid statute of the United States, approved June 3, 1864, and on or about that day a receiver thereof was duly ap-
9 pointed by the Controller of the Currency, pursuant to the provisions of the said statute in such case made and provided, and then and ever since said 22d of September, 1873, said bank has been, and now is, the hands of said receiver in pursuance of said statute.

That on or about the 24th day of September, 1873, the plaintiff made demand upon the defendant for the said sum of seventy-seven thousand five hundred and fifty-nine dollars and twelve cents, ($77,559.12,) but the same was not paid.

That on the eighteenth day of December, one thousand eight hundred and seventy-three, the plaintiff herein received, on account of the said indebtedness of the said defendant, the sum of twenty-three thousand two hundred and sixty-seven dollars and seventy-four cents, ($23,267.74,) and on the twentieth day of March, one thousand
10 eight hundred and seventy-four, so received the further sum of thirty-eight thousand seven hundred and seventy-nine dollars and fifty-six cents, ($38,779.56,) and on the twentieth day of November, in the last-mentioned year, so received the further sum of fifteen thousand five hundred and eleven dollars and eighty-two cents, ($15,511.82.)

That at the times of receiving the said several payments on account of the said indebtedness of seventy-seven thousand five hundred and fifty-nine dollars and twelve cents, ($77,559.12,) interest on the said several sums from said twenty-fourth day of September, eighteen hundred and seventy-three, was by said plaintiff herein claimed and demanded from said defendant, and payment of said interest was refused, and the whole thereof is now due and payable.

That there is now due and wholly unpaid on account of interest
11 on said sums as aforesaid the sum of two thousand eight hundred and eighty-five $\frac{63}{100}$ dollars, ($2,885.63,) with interest from November 20th, 1874.

II. And whereas also afterwards, to wit, on the said twenty-second day of September, eighteen hundred and seventy-three, at the city of New York, the Merchants' National Bank of Poughkeepsie, a corporation duly organized and existing under and pursuant to the acts of Congress of the United States aforesaid, had on deposit in said National Bank of the Commonwealth of the city of New York the sum of eleven thousand nine hundred and thirty-four dollars and eighty-one cents, ($11,934.81,) and was entitled to immediate payment thereof upon demand.

That on the said twenty-second day of September, eighteen hundred and seventy-three, the said National Bank of the Commonwealth
12 refused to pay its circulating notes upon demand, and was in default within the meaning of the statute in such case made and provided, namely, the aforesaid statute of the United States; and on or about that day a receiver thereof was duly appointed by the Controller of the Currency, pursuant to the statutes in such case made and provided,

and that ever since said 22d September, 1873, said bank has been, and now is, in the hands of said receiver, pursuant to said statutes.

That on or about the 24th day of September, 1873, the said The Merchants' National Bank of Poughkeepsie made demand upon the defendant for the said sum of eleven thousand nine hundred and thirty-four dollars and eighty-one cents, (11,934.81,) but the same was not paid.

That on the twenty-fourth day of December, one thousand eight
13 hundred and seventy-three, the said The Merchants' National Bank of Poughkeepsie received on account of the said indebtedness of the said defendant the sum of three thousand five hundred and eighty dollars and forty-four cents, ($3,580.44,) and on the ninth day of March, one thousand eight hundred and seventy-four, so received the further sum of five thousand nine hundred and sixty-seven dollars and forty-one cents, ($5,967.41,) and on the thirtieth day of November, in the last-mentioned year, so received the further sum two thousand three hundred and eighty-six dollars and ninety-six cents, ($2,386.96.)

That at the times of receiving the said several payments on account of the said indebtedness of eleven thousand nine hundred and thirty-four dollars and eighty-one cents ($11,934.81) interest on the said several sums from said twenty-fourth day of September, eighteen-
14 hundred and seventy-three, was by the said The Merchants' National Bank of Poughkeepsie claimed and demanded from said defendant, and payment of said interest was refused, and the whole thereof is now due and payable.

That there is now due and wholly unpaid, on account of interest as aforesaid, on said sums so paid as last aforesaid, the sum of four hundred and forty-four dollars and nine cents, ($444.09,) with interest from November 20th, 1874.

That on November 17th, 1875, for good and valuable consideration it thereunto moving, said The Merchants' National Bank of Poughkeepsie duly assigned, set over, and transferred its aforesaid claim against the said The National Bank of the Commonwealth, the defendant herein, to the plaintiff herein, which is now the lawful owner thereof.

III. And whereas also afterwards, to wit, on the said twenty-
15 second day of September, eighteen hundred and seventy-three, at the city of New York, the Long Island Savings-Bank of Brooklyn, a corporation duly organized and existing under and pursuant to the laws of the State of New York, had on deposit in said National Bank of the Commonwealth of the city of New York the sum of fifteen thousand eight hundred and sixty-eight dollars and sixty-two cents, ($15,868.62,) and was entitled to immediate payment thereof upon demand.

That on the said twenty-second day of September, eighteen hundred and seventy-three, the said National Bank of the Commonwealth refused to pay its circulating notes upon demand, and was in default within the meaning of the statutes in such case made and provided, namely, the aforesaid statutes of the United States; and on or about that day
16 a receiver thereof was duly appointed by the Controller of the Currency, pursuant to the statutes in such case made and provided; and that ever since said 22d September, 1873, said bank has been, and now is, in the hands of said receiver, as provided by said statutes.

That on or about the 24th day of September, 1873, the said The Long Island Savings-Bank of Brooklyn made demand upon the defendant for the said sum of fifteen thousand eight hundred and sixty-eight dollars and sixty-two cents, ($15,868.62,) but the same was not paid.

That on the twenty-third day of December, eighteen hundred and seventy-three, the said The Long Island Savings-Bank of Brooklyn received, on account of the said indebtedness, of the said defendant, the sum of four thousand seven hundred and sixty dollars and fifty-
17 nine cents, ($4,760.59;) and on the seventeenth day of March, eighteen hundred and seventy-four, so received the further sum of seven thousand nine hundred and thirty-four dollars and thirty-one cents, ($7,934.31;) and on the thirtieth day of November, in the last-mentioned year, so received the further sum of three thousand one hundred and seventy-three dollars and seventy-two cents, ($3,173.72.)

That at the times of receiving the said several payments on account of the said indebtedness of fifteen thousand eight hundred and sixty-eight dollars and sixty-two cents ($15,868.62) interest on the said several sums, from said twenty-fourth day of September, eighteen hundred and seventy-three, was by said The Long Island Savings-Bank of Brooklyn claimed and demanded from said defendant, and payment of said interest was refused, and the whole thereof is now due and payable.

18 That there is now due and wholly unpaid, on account of interest as aforesaid on said sums so paid as last aforesaid, the sum of five hundred and ninety dollars and thirty-nine cents, ($590.39,) with interest from November 20th, 1874.

That on November 17th, 1875, for good and valuable consideration it thereunto moving, said The Long Island Savings-Bank of Brooklyn duly assigned, set over, and transferred its aforesaid claim against the said The National Bank of the Commonwealth, the defendant herein, to the plaintiff herein, which is now the lawful owner thereof.

IV. And whereas also afterward, to wit, on the said twenty-second day of September, eighteen hundred and seventy-three, at the city of New York, certain persons doing business as copartners under
19 the firm-name and style of D. C. Silleck & Cox had on deposit in said National Bank of the Commonwealth of the city of New York the sum of five thousand seven hundred and sixty-eight dollars and eighty-eight cents, (5,768.88,) and were entitled to immediate payment thereof upon demand.

That on the said twenty-second day of September, eighteen hundred and seventy-three, the said National Bank of the Commonwealth refused to pay its circulating notes upon demand, and was in default within the meaning of the statute in such case made and provided, namely, the aforesaid statute of the United States, and on or about that day a receiver thereof was duly appointed by the Controller of the Currency, pursuant to the statute in such case made and provided, and that ever since said 22d September, 1875, said bank has been, and now is,
20 in the hands of such receiver, as provided by said statutes.

That on or about the 24th day of September, 1873, the said copartnership firm of D. C. Silleck and Cox made demand upon the defendant for the said sum of five thousand seven hundred and sixty-eight dollars and eighty-eight cents, (5,768.88,) but the same was not paid.

That on the twenty-second day of December, eighteen hundred and seventy-three, the said firm of D. C. Silleck and Cox received on account of the said indebtedness the sum of one thousand seven hundred and thirty dollars and sixty-six cents; and on the ninth day of March, one thousand eight hundred and seventy-four, so received the further sum of two thousand eight hundred and eighty-four dollars and forty-four cents, (2,884.44;) and on the thirtieth day of November, in the last-mentioned year, so received the further sum of one thousand one

21 hundred and fifty-three dollars and seventy-eight cents,($1,153.78.)
That at the times of receiving the said several payments on account of the said indebtedness of five thousand seven hundred and sixty-eight dollars and eighty-eight cents ($5,768.88) interest on the said several sums, from said twenty-fourth day of September, eighteen hundred and seventy-three, was by said firm of D. C. Silleck & Cox claimed and demanded from said defendant, and payment of said interest was refused, and the whole thereof is now due and payable.

That there is now due and wholly unpaid, on account of interest as aforesaid on said sums, the sum of two hundred and fourteen dollars and sixty-four cents, ($214.64,) with interest from November 20th, 1874.

22 That on November 17th, 1875, for good and valuable consideration it thereunto moving, the said firm of D. C. Silleck and Cox duly assigned, set over, and transferred its aforesaid claim against the said The National Bank of the Commonwealth, the defendant herein, to the plaintiff herein, which is now the lawful owner thereof.

V. And whereas also afterward, to wit, on the said twenty-second day of September, eighteen hundred and seventy-three, at the city of New York, one George H. Bend was the lawful owner and holder of a certain check theretofore drawn upon the National Bank of the Commonwealth of the city of New York, defendant herein, and duly accepted and certified by it, for the sum of fourteen thousand two hundred dollars, ($14,200,) and was entitled to immediate payment thereof by defendant upon demand.

23 That on the said twenty-second day of September, eighteen hundred and seventy-three, the said National Bank of the Commonwealth refused to pay its circulating-notes upon demand, and was in default within the meaning of the statutes in such case made and provided, namely, the aforesaid statutes of the United States, and on or about that day a receiver thereof was duly appointed by the Controller of the Currency, pursuant to the statutes in such case made and provided, and ever since said 22d September, 1875, said bank has been, and now is, in the hands of such receiver, as provided by the said statutes.

That on or about the 24th day of September, 1873, the said George H. Bend made demand upon the defendant for the said sum of fourteen thousand two hundred dollars, ($14,200,) but the same was not paid.

That on the twelfth day of March, eighteen hundred and sev-
24 enty-four, the said George H. Bend received, on account of the said indebtedness of the said defendant, the sum of eleven thousand three hundred and sixty dollars, ($11,360,) and on the twentieth day of November, in the last-mentioned year, so received the further sum of two thousand eight hundred and forty dollars, (2,840.)

That at the times of so receiving the said several payments on account of the said indebtedness of fourteen thousand two hundred dollars, interest on the said several sums, from said twenty-fourth day of September, eighteen hundred and seventy-three, was by the said George H. Bend claimed and demanded from said defendant, and payment of said interest was refused, and the whole thereof is now due and payable.

That there is now due and wholly unpaid, on account of inter-
25 est as aforesaid on said sums so paid as last aforesaid, the sum of five hundred and twenty-eight dollars and thirty-one cents, ($528.31,) with interest from November 20th, 1874.

That on November 17th, 1875, for good and valuable consideration nim thereunto moving, said George H. Bend, duly assigned, set over, and transferred his aforesaid claim against the said The National Bank of the Commonwealth, the defendant herein, to the plaintiff herein, which is now the lawful owner thereof.

VI. And whereas also afterward, to wit, on the said twenty-second day of September, eighteen hundred and seventy-three, at the city of New York, certain persons doing business as co-partners under the firm-name and style of Kissam and Company were the lawful owners and holders of a certain check theretofore drawn upon the National Bank of the Commonwealth of the City of New York, defendant herein,
26 and duly accepted and certified by it, for the sum of eight thousand seven hundred and three dollars and seventy cents,($8,703.70,) and were entitled to immediate payment thereof by defendant upon demand.

That on the said twenty-second day of September, eighteen hundred and seventy-three, the said National Bank of the Commonwealth refused to pay its circulating-notes upon demand, and was in default within the meaning of the statute in such case made and provided, namely, the aforesaid statutes of the United States, and on or about that day a receiver thereof was duly appointed by the Controller of the Currency, pursuant to the statute in such case made and provided, and ever since said 22d September, 1873, said bank has been, and now is, in the hands of such receiver, as provided by the said statutes.

27 That on or about the 24th day of September, 1873, the said co-partnership firm of Kissam and Company made demand upon the defendant for the said sum of eight thousand seven hundred and three dollars and seventy cents, (8,703.70,) but the same was not paid.

That on the seventeenth day of December, eighteen hundred and seventy-three, the said firm of Kissam and Company received on account of the said indebtedness of the said defendant the sum of two thousand six hundred and eleven dollars and eleven cents, ($2,611.11;) and on the tenth day of March, eighteen hundred and seventy-four, so received the further sum of four thousand three hundred and fifty-one dollars and eighty-five cents, ($4,351.85;) and on the twenty-first day of November, in the last-mentioned year, so received the further sum of one
28 thousand seven hundred and forty dollars and seventy-four cents, (1,740.74.)

That at the times of receiving the said several payments on account of the said indebtedness of eight thousand seven hundred and three dollars and seventy cents ($8,703.70,) interest on the said several sums from said twenty-fourth day of September, eighteen hundred and seventy-three, was by said firm of Kissam and Company claimed and demanded from said defendant, and payment of said interest was refused, and the whole thereof is now due and payable.

That there is now due and wholly unpaid, on account of interest as aforesaid on said sums, the sum of three hundred and twenty-three dollars and eighty-two cents, ($323.82,) with interest from November 20th, 1874.

29 That on November 17th, 1875, for good and valuable consideration it thereunto moving, said firm of Kissam and Company duly assigned, set over, and transferred its aforesaid claim against the said The National Bank of the Commonwealth, the defendant herein, to the plaintiff herein, which is now the lawful owner thereof.

VII. And whereas also afterward, to wit, on the said twenty-second day of September, eighteen hundred and seventy-three, certain persons

doing business as copartners under the firm-name and style of Ewell, Stout and Company were the lawful owners and holders of a certain check theretofore drawn on the National Bank of the Commonwealth, defendant herein, and duly accepted and certified by it, for the sum of ten thousand and twenty-five dollars, ($10,025,) and were entitled to immediate payment thereof upon demand.

30 That on the said twenty-second day of September, eighteen hundred and seventy-three, the said National Bank of the Commonwealth refused to pay its circulating-notes upon demand, and was in default within the meaning of the statutes in such case made and provided, namely, the aforesaid statutes of the United States, and on or about that day a receiver thereof was duly appointed by the Controller of the Currency, pursuant to the statute in such case made and provided, and ever since said 22d September, 1873, said bank has been, and now is, in the hands of such receiver, as provided by said statutes.

That on or about the 24th day of September, 1873, the said co-partnership firm of Ewell, Stout and Company made demand upon the defendant for the said sum of ten thousand and twenty-five dollars, ($10,025,) but the same was not paid.

31 That on the fifteenth day of December, eighteen hundred and seventy-three, the said firm of Ewell, Stout and Company received on account of the said indebtedness of the said defendant the sum of three thousand and seven dollars and fifty cents, ($3,007.50;) and on the ninth day of March, eighteen hundred and seventy-four, so received the further sum of five thousand and twelve dollars and fifty cents, ($5,012.50;) and on the twentieth day of November, in the last-mentioned year, so received the further sum of two thousand and five dollars ($2,005.)

That at the times of receiving the said several payments on account of the said indebtedness of ten thousand and twenty-five dollars ($10,025,) interest on the said several sums from said twenty-fourth day of September, eighteen hundred and seventy-three, was by said firm of Ewell, Stout and Company claimed and demanded from said defendant,

32 and payment of said interest was refused, and the whole thereof is now due and payable.

That there is now due and wholly unpaid, on account of interest on said sums as aforesaid, the sum of three hundred and seventy-two dollars and ninety-eight cents, from November 20th, 1874.

That on November 17th, 1875, for good and valuable consideration it thereunto moving, said firm of Ewell, Stout and Company duly assigned, set over, and transferred its aforesaid claim against the said The National Bank of the Commonwealth, the defendant herein, to the plaintiff herein, which is now the lawful owner thereof.

And the said defendant, although often requested so to do, has wholly neglected and refused, and does as yet wholly neglect and refuse, to pay the sums hereinbefore demanded, or any part thereof, to the damage of the plaintiff to five thousand three hundred and fifty-nine dollars

33 and eighty-six cents,($5,359.86,)with interest from November 20th, 1874, and therefore it brings its suit.

MILLER, PEET & OPDYKE,
Plaintiff's Attorneys.

(Endorsed:) U. S. circuit court, southern district of N. Y. Mechanics' National Bank of Trenton, New Jersey, vs. National Bank of the Commonwealth, New York. Declaration. Miller, Peet & Opdyke, plaintiff's attorneys, 20 Nassau st., N. Y. City. Filed Dec. 7, 1875.

34 Circuit court of the United States for the southern district of New York, in the second circuit.

THE MECHANICS' NATIONAL BANK OF TRENTON, New Jersey,
against
THE NATIONAL BANK OF THE COMMONWEALTH of the City of New York.
} Demurrer.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

And the said The National Bank of the Commonwealth, defendant in this suit, by George Bliss, its attorney, comes and defends the wrong and injury, when, &c., and says that the said declaration and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law for the said plaintiff to have or maintain its aforesaid action thereof against the said defendant, that the said declaration or complaint does not state facts sufficient to constitute a cause of action, and that it, the said defendant, is not bound by law to answer the same. Wherefore, for want of a sufficient declaration in this behalf, the said defendant prays judgment and that the said plaintiff may be barred from having or maintaining its aforesaid action thereof against it, said defendant, &c.

35

GEORGE BLISS,
Deft.'s Atty.

I certify that I have examined the foregoing demurrer and the grounds thereof, and that in my opinion the same are well founded in law.

GEORGE BLISS,
A Counsellor of said Circuit Court.

(Endorsed:) U. S. circuit court, so. dist. of New York. The Mechanics' National Bank of Trenton, New Jersey, vs. The National Bank of the Commonwealth of the City of New York. Demurrer. George Bliss, deft.'s atty.

36

Demurrer overruled and judgt. ordered for plff. Feby. 29, 1876.
WM. J. WALLACE.

Filed Dec. 23, 1875.

37 Circuit court of the United States for the southern district of New York, in the second circuit.

THE MECHANICS' NATIONAL BANK OF TRENTON, New Jersey,
against
THE NATIONAL BANK OF THE COMMONWEALTH of the City of New York.

And the said plaintiff saith that the said declaration and the matters therein contained, in manner and form as the same are above stated and set forth, are sufficient in law for it, the said plaintiff, to have and maintain its aforesaid action thereof against the said defendant; and the said plaintiff is ready to verify and prove the same, as the court here shall direct and award.

Wherefore, inasmuch as the said defendant hath not answered the said declaration, nor hitherto in any manner denied the same, the said plaintiff prays judgment and its debt aforesaid, together

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with its damages by it sustained, on occasion of the declaration thereof to be adjudged to it, &c.

MILLER, PEET & OPDYKE,
Plaintiff's Attorneys.

(Endorsed:) United States circuit court. The Mechanics' Bank of Trenton against National Bank of the Commonwealth. Joinder in demurrer. Miller, Peet & Opdyke, plaintiff's attorneys, 20 Nassau st., N. Y. Filed December 24, 1875.

39 At a stated term of the circuit court of the United States for the southern district of New York, in the second circuit, held at the court-house in the city of New York, on the twenty-ninth day of February, in the year one thousand eight hundred and seventy-six.

Present, Hon. William J. Wallace, district judge.

THE MECHANICS' NATIONAL BANK OF TRENTON, New Jersey,
against
THE NATIONAL BANK OF THE COMMONWEALTH of the City of New York.

This action having been brought to trial on the issue of law joined herein, and George Bliss, esq., appearing as counsel for defendants in support of the demurrer to the declaration, and Miller, Peet and
40 Opdyke for plaintiffs in opposition thereto, and due deliberation having been had thereon, now, on motion of Miller, Peet and Opdyke, plaintiff's attorneys, it is ordered that the demurrer to the declaration herein be, and the same hereby is, overruled, and that plaintiff have judgment absolute thereon.

WM. J. WALLACE.

(Endorsed:) U. S. circuit court, southern district of N. Y. The Mechanics' National Bank of Trenton, New Jersey, against The National Bank of the Commonwealth of the City of N. Y. Order for overruling of demurrer. Miller, Peet & Opdyke, attys. for plaintiffs, 20 Nassau st., N. Y. C. L. D. No. 4, p. 125. Filed Mch. 16, 1876.

And because the said court, before the aforesaid justices thereof
41 now here, is not yet advised what judgment to give of and upon the premises, therefore the process thereof is continued between the parties aforesaid, of the plea aforesaid, in this same court, before the justices thereof, until the twenty-ninth day of February, 1876, of the term of October, in the year of our Lord one thousand eight hundred and seventy-five, at the United States court buildings in the city of New York; and the same day is given to the parties aforesaid, at the same place, to hear the judgment of the said court thereupon.

At which day, before the justice aforesaid, at the United States court building in the city of New York, came as well the said plaintiff as the said defendant, by their respective attorneys aforesaid. Whereupon all and singular the premises aforesaid being seen by the court now
42 here and fully understood, and mature deliberation being thereupon had, it appears to the said court now here that the declaration aforesaid and the matter therein contained are sufficient in law for the said plaintiff to have and maintain his aforesaid action thereof against the said defendant; wherefore the said plaintiff ought to recover against the said defendant his damages on occasion of the premises.

Therefore, it is considered that the said plaintiff do recover against the said defendant its damages by occasion of the premises to five thousand eight hundred sixty dollars and eleven cents, by the court here assessed, and also twenty-seven dollars and forty cents for its costs and charges, by the court now here adjudged to the said plaintiff with its
43 assent; which said damages, costs, and charges, in the whole, amount to five thousand eight hundred and eighty-seven dollars and fifty-one cents.

And the said defendant in mercy, &c.

Judgment signed this twenty-fourth day of March, 1876.

J. M. DEUEL,
Depy. Clerk.

(Endorsed:) United States circuit court. The Mechanics' National Bank of Trenton, New Jersey, against The National Bank of the Commonwealth of the City of New York. Judgment-record on demurrer. Miller, Peet & Opdyke, plaintiff's attorneys, 20 Nassau st., N. Y. C. L. D., No. 4, p. 124. Filed March 24, 1876.

44 Supreme Court of the United States.

THE NATIONAL BANK OF THE COMMONWEALTH of the City of New York, plaintiff in error,
vs.
THE MECHANICS' NATIONAL BANK OF TRENTON, New Jersey, defendant in error.

Security on the part of the plaintiff in error in this suit, that it shall *present* its writ of error to effect and pay all damages and costs which shall be assessed against it if it shall fail to make said writ of error good, is hereby waived.

Dated New York, April 13th, 1876.

MILLER, PEET & OPDYKE,
Attys. for Deft. in Error.

(Endorsed:) U. S. Supreme Court. The National Bank of the Commonwealth of the City of New York, plaintiff in error, vs. The Mechanics' National Bank of Trenton, New Jersey, defendant in error. Waiver of security on writ of error. Geo. Bliss, atty. for plff. in error. Filed Apl. 14, 1876.

45 Supreme Court of the United States.

THE NATIONAL BANK OF THE COMMONWEALTH of the city of New York, plaintiff in error,
against
THE MECHANICS' NATIONAL BANK OF TRENTON, New Jersey, defendant in error.

Of October term, in the year of our Lord one thousand eight hundred and seventy-six.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said The National Bank of the Commonwealth, by George Bliss, his attorney, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit: That by the record aforesaid it appears that

the judgment aforesaid, in form aforesaid given, was given for
46 the said defendant against the said plaintiff, whereas by the law of the land the said judgment ought to have been given for the said plaintiff against the said defendant. And the said plaintiff prays that the judgment aforesaid for the error aforesaid, and other errors in the record and proceedings aforesaid, as the same appears more fully herein, may be reversed, annulled, and altogether held for nothing, and that he, the plaintiff, may be restored to those things which he has lost by reason of the said judgment.

GEORGE BLISS,
Attorney for the Plaintiff in Error.

(Endorsed:) U. S. Supreme Court. The National Bank of the Commonwealth of the city of New York, plff. in error, vs. The Mechanics' National Bank of Trenton, deft. in error. Assignment of error. Filed Sept. 28, 1876.

47 UNITED STATES OF AMERICA, *ss:*

To the Mechanics' National Bank of Trenton, New Jersey, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden in the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein The National Bank of the Commonwealth of the city of New York is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Samuel Blatchford, judge of the circuit court of the United States for the southern district of New York, the 13th day of April, in the year of our Lord one thousand eight hundred and seventy-six.

SAML. BLATCHFORD, *D. J.*

48 (Indorsed:) Supreme Court of the United States. The National Bank of the Commonwealth of the city of New York, plaintiff in error, vs. The Mechanics' National Bank of Trenton, New Jersey, defendant in error. Citation. Filed Apl. 14, 1876. George Bliss, atty. for plff. in error.

Service of a copy of the within citation is hereby admitted, April 14th, 1876.

MILLER, PEET & OPDYKE.
Attys. for Deft. in Error.

(Indorsement on cover:) No. 905. The National Bank of the Commonwealth of New York City, plaintiff in error, vs. The Mechanics' National Bank of Trenton, New Jersey. S. New York, C. C. U. S. Filed 27th October, 1876.

In the Supreme Court of the United States.

OCTOBER TERM, 1876.

THE NATIONAL BANK OF THE COMMONWEALTH OF NEW YORK CITY, PLAINTIFF IN ERROR,
vs.
THE MECHANICS' NATIONAL BANK OF TRENTON, NEW JERSEY.
} No. 905.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Brief of the Plaintiff in Error.

In the Supreme Court of the United States.

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vs.
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No. 905.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF OF THE PLAINTIFF IN ERROR.

This is an action of assumpsit brought by the Mechanics' Bank to recover the interest upon certain deposits in the Bank of the Commonwealth on the 22d day of September, 1873, the date at which the latter became *in default* under the national-banking act, (Rev. Stat., sec. 5234,) and went into the hands of a receiver, in which hands it has remained ever since.

On or about the 24th of September, 1873, *demand* for such deposits was made of the Bank of the Commonwealth.

The receiver has, in three installments, (last dated November 20, 1874,) paid up the principal-money of such deposits; but although at the times of receiving such payments interest thereon was demanded of the Bank of the Commonwealth, it was refused.

The declaration is divided into several heads, on account of several different deposits being claimed therein; all of these, however, are now owned by the Mechanics' Bank, and all stand upon substantially the same footing.

The declaration claims, also, *interest* upon the interest mentioned above from November 20, 1874.

The case stands upon an issue of law raised by a demurrer to the declaration.

Judgment in the court below was given for the Mechanics' Bank for $5,860.11, being the amount of the interest claimed upon the deposits, (Record, folio 7,) and of interest upon such interest, as above. (Record, folios 42–3.)

For error, the plaintiff in error assigns:

1. The allowance of interest upon the deposits from the date of demand.

2. The allowance of interest upon interest.

3. That judgment was not given for the plaintiff in error.

1. No interest should have been allowed upon the deposits.

This is a case of interest being due as *damages for delay* in payment of the principal; and *not* because of an express contract to pay it.

It such case the well-settled rule is that interest is not recoverable by suit after the principal-money has been discharged. (Dixon *vs.* Parkes, 1 Esp., 110; Fake *vs.*

Eddy, 15 Wend., 76; Comporet *vs.* Ewing, 8 Blackf., 328; Faurie *vs.* Pitot, 2 Martin, (La.,) 83; Moore *vs.* Fuller, 2 Jones, (N. C.,) 205.)

The record here leaves no doubt that the payments made to the receiver were applied to the *principal* of the debt. The declaration states (folio 10) that when the installments were paid, the Mechanics' Bank "demanded from the said defendants" (The Bank of the Commonwealth) "interest upon the deposits, and payment of said interest was refused." This case, therefore, differs from that of The People *vs.* The City of New York, (3 Cowen, 321,) where payments were made which amounted to the principal-money, but there was no *application* thereof. In that case the court said, "For aught that appears the payments were made and received generally on account; which account was composed of principal and interest." In the present case the debtor *exercised the option which belonged to him*, (Pindall *v.* Bank, &c., 10 Leigh, 481; Miller *v.* Trevillian, &c., 2 Rol., (Va.), 2; 1 Am. Lead. Cases, 276 *n*,) of applying the payments to the principal, and these were so received by the creditor. The latter acted freely and at his own peril.

In speaking of this matter in Fake *vs.* Edy, (*ubi supra*,) Chancellor Walworth, after citing various New York cases, said that "they were all cases in which there was no *contract* for the payment of interest, and it could only be recovered as *damages* for the non-payment of the principal debt when it became due. In such cases if the party to whom the money is payable accepts the amount agreed to be paid in full satisfaction *of the principal debt, without requiring the debtor to pay interest* from the time the debt became payable, he cannot afterward maintain an action for the mere incidental

damages which he has sustained by reason of the debt not being paid upon the very day when it became due. But where there is an express agreement to pay the interest as well as the principal of the plaintiff's demand, I apprehend," &c., &c.

Here the Mechanics' Bank accepted the money paid as *required* to do so by the Bank of the Commonwealth, viz, *in full satisfaction of the principal debt;* it did not then *require* the payment of the interest. It *demanded* it, and may be regarded as having *protested* against not receiving it; but protests are meaningless where the protestant at the same time surrenders his cause of action, as is illustrated by the recent case of Savage *vs.* The United States, (92 U. S. Reports, 382.) Indeed, the clause "without requiring," &c., in the above passage, is a mere gloss upon the preceding clause, meaning that an acceptance of the payment in full of the principal is a failure to *require* (in a legal sense) payment of the interest. The supreme court of Maine treat it thus, for in quoting the passage they *leave out* that clause, as if merely explanatory of what is clear without it. (Howe *vs.* Bradley, 19 Maine, 31.)

A second objection to the recovery of interest is that the demand should have been made *upon the receiver*, instead, as is stated in the declaration, (above,) of the Commonwealth Bank. Some demand was necessary, (In re Herefordshire Bank, 4 Eq., L. R., 250,) and after the 22d of September, 1873, under the authority of the statute, the *receiver* became paymaster. After that time the plaintiff in error was a mere name; its substance was beyond its control.

2. Interest is not due upon interest in such a case. This is a suit at law. Even if it had been in equity, there is nothing in the circumstances to justify *compounding*. The refusal by the receiver to pay interest is not chargeable upon the stockholders as their fault.

Out of many cases supporting this proposition, I cite Stokely *vs.* Thompson, (34 Pa. State, 210;) Van Husen *vs.* Kanouse, (12 Mich., 303.)

S. F. PHILLIPS.

O

Supreme Court of the United States.

THE NATIONAL BANK OF THE COMMONWEALTH OF NEW YORK CITY,
Plaintiff in Error,

versus

THE MECHANICS' NATIONAL BANK OF TRENTON, NEW JERSEY,
Defendant in Error.

No. 905.
Brief for the Defendant in Error.

STATEMENT.

This suit was brought by the defendant in error against the National Bank of the Commonwealth of the City of New York, plaintiff in error, both upon a claim originally vested in the said Mechanics' National Bank of Trenton, and also upon claims assigned to it by the Merchants' Bank of Poughkeepsie, the Long Island Savings Bank of Brooklyn, the firm of D. C. Silleck & Cox of the City of New York, one George H. Bend of the City of New York, the firm of Kissam & Co. of the City of New York, and the firm of Ewell, Stout & Co. of the City of New York.

These claims were all founded upon the alleged liability of the Bank of the Commonwealth to the various claimants for the interest upon the balances of the respective deposit accounts of the said per-

sons and corporations remaining in the said bank on September 22d, 1873.

On September 22d, 1873, the said Bank of Commonwealth having refused to pay its circulating notes upon demand, a Receiver thereof was duly appointed by the Comptroller of the Currency, under and pursuant to the provisions of section 50 of the National Bank Act of the United States, passed the 3d day of June, 1864.

The declaration alleges the amounts of the balances due to the said creditors respectively; that these claims were payable on demand, and that the demands were made on Sept. 24th, 1873, upon the said Bank of Commonwealth by the respective claimants, for each of their said balances, and that payment of the same was refused.

The declaration further admits the receipt by the respective claimants of certain per centages of payments upon the respective claims at different times, the last payment being on November 20th, 1874, such last payment completing the payment of an amount equal to the original demands, *without interest* thereon, and alleges that the respective claim ants, at the time of receiving the said several payments, claimed and demanded the payment of the interest on the several amounts of such claimants from September 24th, 1873, and that payment of said interest was refused.

The declaration further alleges assignments of the said claims for good and valuable considerations from each of the said claimants to the defendant in error, and alleges that there is due and unpaid on account of interest upon the said balances of deposit, after crediting the payments on that account, the sum of $\$5,359\frac{86}{100}$, with interest from November 20th, 1874.

The Bank of Commonwealth, plaintiff in error, demurred to the declaration as not stating facts sufficient to constitute a cause of action; which demurrer was overruled by the Court below, whereupon judgment was entered in favor of the Trenton

Bank, defendant in error, for the full amount of its claim, with interest.

The action of the Court below was based upon its former decision in the case of the Chemical National Bank *vs.* The National Bank of the Commonwealth, reported 12 Blatchford, 480.

The suit was then removed to this Court by writ of error.

It may be seen from the record that the original claim of the defendant in error was not sufficient, (if it had sued upon such claim alone), to enable an appeal to be taken to this Court; and it may be proper to state that the suit was brought in this form by arrangement, in order to procure an authoritative ruling from this Court, by which the Comptroller of the Currency may be guided in similar cases.

The contention which it is intended to raise is, whether, when under a Receivership of a National Bank, created pursuant to U. S R. S., § 5234, a surplus is realized after the payment of the principal of all claims, the Comptroller of the Currency should or should not also pay the *interest* upon such claims during the period of administration, before appropriating the surplus to the stockholders of the bank. To a discussion of this question, the points of the defendant in error will be at first directed.

POINTS.

I.

It is the duty of the Comptroller of the Currency to apply the moneys received by him from the assets of a National Bank through a Receivership, to pay "all such claims as may have been proved to his sat-"isfaction, or adjudicated in a Court of competent "jurisdiction," and then to distribute the remaining proceeds among the stockholders.

National Bank Act., § 50, U. S. R. S., § 5236.

Claims which are thus to be brought into Court for "adjudication," are properly brought against the Bank, and are brought to determine "the validity "of the claim and the amount due by the associa- "tion."

Bank of Bethel *v.* Pahquioque Bank, 14 Wall., 383-402.

Hence, if a depositor has a valid claim against *the Bank* for interest upon his balance of account the payment of which balance the Bank wrongfully refused, this is one of the claims which the Comptroller must pay.

II

It is submitted that this claim for interest against *the Bank*, is clear under well settled rules of law.

It is now uniformly held that interest is due and allowed upon a contract debt, from the time that payment thereof was unjustly refused.

> Interest runs upon an account stated from the time of stating the same.
>
> Bainbridge *v.* Wilcocks, Baldw., 536.

> Interest was allowed upon a balance of account, from the time that the debtor improperly claimed to extinguish the same by an alleged offset.
>
> Vose *v.* Philbrook, 3 Story, 336.

> Interest was allowed against consignees (in assumpsit) from the time of receiving the proceeds of the cargo.
>
> Ricketson *v.* Wright, 3 Sumn., 335.

> Interest runs upon coupons to bearer if not paid when due.
>
> Aurora City *v.* West, 7 Wall., 82.
> Town of Genoa *v.* Woodruff, 92 U. S. S. C., 502.

The claims now sued upon being payable upon demand, interest therefore began to run from the Bank's refusal to pay on September 22d, 1873.

III.

Independently of the direction of the Statute to the Comptroller to pay all claims that are valid against the Bank, the general rule would require the payment of interest out of a fund established for the benefit of creditors, before paying over any surplus to those entitled to such residue, wherever the creditor would be entitled to interest as against the debtor himself, and independently of any question whether the debt was one on which interest was running by the terms of the contract.

Such has been the uniform rule in this country.

In *Champneys* v. *Lyle*, 1 *Binney*, 327, it was held that a surety who claimed against the estate of a bankrupt, by reason of having paid the insolvent's customs bond to the United States, was entitled to a preference not only for the principal sum paid, but also for interest thereon even after the date of the commission of bankruptcy.

In *Schults* v. *Weaver*, 11 *Serg. & R.* 182, it was held that creditors by specialty being entitled to a preference against estates of a decedent, they were also preferred for interest on their claims after the death of the decedent and up to the time payment.

In *Williams* v. *Amer. Bk.* 4 *Metc.* 317, it was held, per Shaw, C. J., that all the creditors were entitled to interest down to the time of decree, upon their claims against the estate of a decedent, which had been placed in the hands of commissioners of insolvency, as

against the claims of the widow and heirs, although such allowance of interest would exhaust the fund. To the same effect is *Green* v. *Abbott*, 2 *Root*, (*Conn.*,) 242.

In *Brown* v. *Lamb*, 6 *Metc.*, 203, the assignees of an insolvent were directed to pay interest upon all claims down to time of distribution before returning any surplus to assignor.

In *Ellicott* v. *Ellicott*, 6 *Gill.* & *J.*, 36, a mode of computation and payment of claims against the estate of a decedent was adopted, which would give interest down to the time of payment, before any payments to the heirs or next of kin.

So, also, creditors who are preferred under a voluntary assignment, are entitled to interest, before any payment to creditors of a second class.

Scott *v.* Morris, 9 Serg. and R., 123.
Bryant *v.* Russell, 23 Pick., 508.

And again, secured creditors can avail themselves of their security for payment of both principal and interest of their claims.

In re Haake, 2 Saw., 231.
In re Newland, 7 Ben., 63.

IV.

Where there is no surplus, and where the fund is therefore a "dead fund," the admitted rule is to assume a common date, as of which all interest is adjusted, even by discount, where necessary. This is not only for purposes of convenience, but also to place upon a common footing those whose claims were running at interest and those on which no interest was accruing. For the failure to pay not

being the fault of the creditor, the Courts do not desire that his condition should be made comparatively worse by the delay.

See remarks of Chief Justice Shaw, in Williams *v.* Amer. Bank, 4 Metc., page 321.

But no such reason exists where there is a surplus, and the debtors (or the Bank's stockholders) are not entitled to the benefit of a rule established only for the benefit of creditors.

Could it be claimed that the Comptroller could take off the interest upon a time obligation of the Bank, from the time of the Receivership to its maturity, although he did not pay it until after such maturity ?

V.

The older English decisions which may be cited *contra*, can have no application.

The English Bankrupts Acts prior to that of 6 Geo. IV., provided for the payment to the bankrupt of any surplus after "payment of claims proved" or "the full satisfaction of creditors." The Courts seemed to assume that these words meant the satisfaction of the claims at the time of the issue of the commission. Under the construction given to these Acts no interest was to be allowed generally afte the date of the commission.

But even under this construction, interest was allowed where there was a surplus, in all cases where the contract carried interest.

Broomley *v.* Godere, 1 Atk., 75.
2 Blackstone Com., 488.

Or where interest was implied by the course of dealing.

Ex parte Champion, 3 Bro. C. C., 436.
" " Williams, 1 Rose, 399.

Or upon notes payable upon demand, after partial payment of interest.

Ex parte Hankey, 3 Bro. C. C., 504.

But the rule thus established was not satisfactory, and was altered by St. 6 Geo. IV., c. 16, § 132, so as to allow interest, upon all claims whatever, in all cases of surplus.

See also St. 5 Geo. IV., c. 98, § 55.
Eden on Bankruptcy, 2d ed., 391-394.
2 Christian on Bankruptcy, 277.

The old English rule was disregarded in Massachusetts (Brown *v.* Lamb, *supra*) as of no authority even in interpreting a similar Massachusetts Statute; and was further distinguished as being founded upon rules as to the allowance of interest then prevailing in England, which were entirely dissimilar to those recognized universally in this country.

The rule which was discarded even in England, will not now be established here for the first time.

It has not been recognized in our Courts of Bankruptcy, although § 5101 and § 5102, U. S. R. S. (Title Bankruptcy), are silent as to allowance of interest. Still it has been uniformly held that in cases of surplus, interest is to be allowed from the date of the adjudication, down to the time of payment.

In re Bank of North Carolina, 12 N. B. R., 130.
In re Bank of North Carolina, 10 N. B. R., 289.
In re Edward Hagan, 10 N. B. R., 383.
In re R. M. & S. R. Town, 8 N. B. R., 40.
See In re Strachan, 3 Biss., 181.

This is the rule now fixed in England, not only in bankruptcy but also in cases of the winding up of corporations.

In re East of England Banking Co. L. R., 6 Eq., 368–377.

VI.

The only possible reason for denying a judgment against the bank in this suit would be to save for the stockholders of the bank the amount required to pay depositors the interest accruing after the appointment of the receiver.

The stockholders are liable under the Statute "for all contracts, debts and engagements of such "Association to the extent of the amount of their "stock therein at the par value thereof, in addition "to the amount invested in such shares." U.S.R.S., § 5151. So that the amount of interest to the depositors must be paid either from the assets of the Bank that would otherwise go to the stockholders, or from the proceeds of assessment upon the stockholders.

It is submitted that under the modern rule as to the allowance of interest, this claim of depositors for interest stands upon the same basis as the claim for principal.

Ex parte Eyre, 1 Bligh. 582, note, p. 605.
Bland *v.* Robinson, 2 Burr, 1077, p. 1068.
Selleck *v.* French, 1 Conn., 32, p. 35.
Obermeyer *v.* Nichols, 6 Binn., 159, p. 162.
Osborn *v.* U. S. Bank, 9 Wheat., 738, p, 837.

The ancient prejudice against interest has no footing in our law to-day.

The stoppage of the bank, the appointment of the receiver and the delay in the payment of the creditors of the bank, all arise from the fault and misconduct of the bank corporation which was controlled by the stockholders.

This is not a case of an inability to pay arising from causes beyond the acts of the debtor himself, as the service of an injunction or attachment. It is only where the debtor is himself altogether innocent of the delay and subject to inhibition not based

upon any default of his own that the payment of interest is not allowed. See

Willings *v.* Consequa, Peters C. C., 303.
Stevens *v.* Barringer, 13 Wend., 639.
Gillespie *v.* Mayor, &c., 3 Edw. Ch., 512.
Georgia Ins. & T. Co. *v.* Oliver, 1 Kelly, 38.
Osborn *v.* U. S. Bank, 9 Wheat., 739, 838.

VII.

The acceptance by the defendant in error of the instalments paid to it on account of its claim against the Commonwealth Bank did not waive, nor did it take away the claim for interest upon the debt.

The record shows that at the time of the making of each payment upon the debt, interest was demanded and refused (folios 10, 13, etc).

The interest began to run from the time of the making of the demand of the bank, Sept. 24, 1873, and having commenced so to run, was as much a part of the debt as the principal itself.

(1.) It is true that the cases cited by the opposing counsel hold generally that, except where interest runs upon the debt by virtue of the contract itself, a separate suit for the interest cannot be brought after payment of the principal. (*Dixon* v. *Parks*, 1 *Esp.*, 110; *Tillotson* v. *Prescott*, 3 *John*, 229; *Fake* v. *Eddy*, 15 *Wend.*, 76). In fact some of the older cases cited, go farther, and hold that interest being a mere incident of the debt, can never be the subject of a separate suit. The sufficiency of this reasoning, however, has been wholly exploded; and the only foundation for the claim now made, is a supposed technical rule, that where interest is given by way of damage, and not by the terms of the contract, the right is lost when the principal sum is paid.

It is submitted that at this day, under the rulings now accepted in regard to the payment of interest,

such doctrine cannot be supported. If a debtor has incurred a penalty by way of interest for the wrongful refusal to pay a debt, he will not be relieved from such penalty upon technical grounds, because he, at some late day, does actually pay the principal sum which he was bound to pay long before.

It may even be claimed further that under the modern doctrine the allowance of interest in cases like this, is rather on account of an implied contract than by way of penalty.

U. S. *v.* Gurney, 4 Cranch., 333–345.

(2.) Independently of this, however, the acceptance of the principal sum does not affect the claim to interest, unless such payment was accepted in *satisfaction* of the debt.

Burr *v.* Burch, 5 Cranch, C. C. 506.
U. S. *v.* Gurney, 4 Cranch., 333–345.
See 1 Amer. L'dg Cases (5th Ed'tn), 646.

The case of *Burr* vs. *Burch* was assumpsit for legacy. Plaintiff had given a receipt for principal, reserving the question of interest to be afterwards settled. The defendant cited *Dixon* vs. *Parks*, *Tillotson* vs. *Prescott*, as barring the claim. It was held by the Court that where the claim for interest is expressly reserved the receipt for principal was no bar.

It is submitted, that no case can be cited *contra*, when the question was clearly presented, except perhaps, the case of *Moore* v. *Fuller* (6 Jones, L. R., 205). But in this case, the principal having been paid, and the claims to interest being reserved and left to arbitration, it was held merely that the right of action, if any, was upon the award.

In the case at bar, the payments on account of the claim, were clearly not accepted in *satisfaction* of the claim, but interest in addition was distinctly claimed.

(3.) Moreover, this is not a case of payment *by the debtor*, but, of the receipt of dividends, received from a fund in the course of administration for the benefit of creditors.

In such administration the orderly course is to pay, *pro rata*, dividends upon the face of claims first, and then if any surplus arises, to pay interest up to the dates of payment. (See cases under Point III.)

Therefore, the technical rules which might be applied where the principal was accepted from the debtor, have no pertinency here.

(4.) The fund being one to be administered under the rules of law, the Court will, if necessary, make such application of the payments as shall be equitable.

The usual application is, of course, made first to the interest, and this is so whether the interest is given under the contract or by way of damages.

Story *v.* Livingston, 13 Peters, 359.
Smith *v.* Shaw, 2 Wash., C. C., 167.

The Comptroller of the Currency is not the representative of the stockholders, at least not exclusively, and cannot be supposed to apply the payments in such manner as to benefit the stockholders at the expense of the creditors.

Where the fund is made by law and not by the debtor the Court will apply the payments according to the known rules and not according to the wishes of either party.

Larrabee *v.* Lumbert, 34 Maine, 79.

VIII.

The demand for payment was made upon the proper party, namely: the bank or the debtor.

The receiver was not a receiver of the Corporation, but the mere agent of the Comptroller of the Cur-

rency; and the Corporation was then, and still is, subsisting.

This action is properly against the bank as above shown; and a demand upon the bank was the only demand that could properly be made or alleged.

No suit would lie against the Receiver or the Comptroller.

Bank of Bethel *v.* Pahquioque Bank, (supra.)
Chemical Bank *v.* Commonwealth Bank, 12 Blatch. 480.

IX.

The demurrer is to the whole declaration, and not to that part of it which is interpreted as demanding interest upon interest. Therefore, if the declaration was good as to any part of the claim made, the demurrer cannot be sustained on the ground that an erroneous demand was made for the payment of interest upon interest. The defect, if any, is not one of misjoinder.

1 Chitty's Pleadings, 371, 696–7.
Story's Equity Pleadings, Section 433.
1 Daniells' Ch. Pleading and Practice, 4th Am. Ed., 584, and cases there cited.
U. S. R. S., § 954.

Moreover, in the State of New York, interest upon interest is often allowed, without positive contract, and even where it is not a penalty for a tortious act.

So upon an account rendered including interest.

Crane *v.* Hardman, 4 E. D. Smith, 448-451.

So upon arrears of interest payable semi-annually on a bond, after demand.

Mowry *v.* Bishop, 5 Paige, 98–101.
Hosack v. Rogers, 9 Paige, 463–5.
Howard *v.* Farley, 3 Robt., 308.

Any error in the amount of the judgment should be corrected "according to the right of the cause "and matter in law shall appear."

X.

The judgment of the Court below should be in all respects affirmed, with costs.

MILLER, PEET & OPDYKE,
Attys. for Def't in Error.

WM. S. OPDYKE,
of Counsel.

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4-441

Supreme Court of United States.

CONRO & CARKIN
vs.
CRANE & HODGKINS.

Motion to Dismiss.

The facts of this case are set forth in the briefs already filed, and need not be repeated.

A sale of perishable property was made by a provisional assignee in bankruptcy. Hodgkins, as agent of Crane, bid for the same $40,000; this sale was reported to the court by the provisional assignee and an order entered that all persons in interest should show cause on the 9 July why the same should not be confirmed.

The assignee, on the 9th, reported that he had published the order and given special notice to each of the creditors of the same, and that no objection had been made, and therefore the court on same day entered an order of confirmation, and directing the assignee, on payment of the bid, to execute a bill of sale and deliver the property to the purchaser.

The purchaser was notified of the confirmation on the 10th, which was Saturday, and early on Monday following, without giving the purchaser an opportunity to pro-

cure the money bid, the assignee induced the District Court, by fraudulent misrepresentations, and without any notice to Hodgkins or Crane, to set aside this confirmation, and at the same moment direct a sale to be made to Conro & Carkin, and this was done.

Thereupon certain proceedings were had before Judge Drummond in the Circuit Court, under the 2d section of the bankrupt act, which finally terminated in a decree directing the District Court to set aside the sale to Conro & Carkin, and affirming the confirmation of the sale made on the 9th July to Hodgkins for Crane.

An appeal was prayed for by Conro & Carkin, and by Hancock, the assignee, a supersedeas bond was tendered, but appeal prayed for was denied by Judge Drummond, on the ground that no appeal would lie from a decree in the exercise of the supervisory jurisdiction.

An application was then made to a to a Justice of this court, who allowed the appeal, and it is now prosecuted in behalf of Conro & Carkin alone.

The opinion of the judge forms a part of the record, and fully exposes the improper and fraudulent conduct of the provisional assignee in his dealing with the district judge as well as with the first purchasers.

The motion to dismiss must succeed on the well settled decisions of this court, if the Circuit Court was authorized to deal with the case under its supervisory jurisdiction.

It is maintained, in opposition, that when the District Court set aside the confirmation of the 9th July, and directed the delivery of the property to Conro & Carkin, it ceased to have any further jurisdiction over the subject matter.

And again, that if it did possess jurisdiction, its action was not subject to be reviewed by the Circuit Court, in the exercise of its supervisory powers.

As to the first objection we say, that the purchase made by Hodgkins, and its confirmation by the Court, imposed a *legal obligation* upon him, which could have been enforced by a suit for specific performance or by an action at law, or if a resale had been ordered, he could have been compelled to pay the difference, if the property had brought less than his bid.

This legal obligation, carried along with it a *legal right* to have the title to the property vested in him on payment of the purchase money.

This legal right was violated. No time was allowed to the purchaser to procure the purchase money, and without notice to him his confirmation of purchase was set aside.

That such a proceeding finds no justification either in law or morals would seem to be evident. It is so declared by this Court in Blossom v. Railroad, (1 Wall, 656.) The purchaser (say the court), who has bid off property in good faith is vested with inchoate rights, which entitle him to a hearing on the question whether the sale should be set aside.

The sudden change of front on the part of the provisional assignee, who, on the 9th, asked for a confirmation to Hodkins, and on the 12th asked that this confirmation be set set aside in favor of another purchaser, is explained by the facts proved before the Circuit Judge, and justifies his denunciation of the conduct of this officer as a fraud upon the District Judge as well as upon the first purchasers.

Then the question arises, whether there is any provision of law which would prohibit the District Judge from reversing the confirmation made to the second purchaser.

The power exists in all courts to correct its own improvident orders and judments even in formal trials, and

after full hearing, during the term; and it would be a surprise to hear there was any provision in the Bankrupt act which would prevent the District Judge from the exercise of such a power, when the principles of justice demanded it.

In Bankruptcy proceedings the District court is always open, and, as is said in Sandusky vs. National Bank, 23 Wall., 293,—"It has no special terms, and its proceedings are therefore always open for re-examination."

The sale was not made by an assignee in Bankruptcy—who is vested by the act with certain powers. It was made here by the Court itself, under § 5065, R. S., which provides that where property is of a perishable nature, "the Court may order the same to be sold in such manner as may be deemed most expedient, under the direction of the *messenger*, or assignee, as the case may be," &c.

But the case does not rest on the fact that the sale was made by the Court through its "Messenger."

The 4th section of the Amendatory act 22 June, 1874, (18 Stats. 178) provides, that unless "otherwise ordered" the assignee shall sell at public auction, with such published notices as the court may designate. And it is then added "that on the application of any party in interest, it shall have complete supervisory power over such sales, including the power to set aside the same and to order a re-sale.

The power thus conferred on the District Court to supervise the sale, is one that is properly exercised in a summary mode, and might have been exercised even on *ex parte* evidence.

Savery v. *Sypher*, 6 Wall., 158.

This is a full answer to the objection of the want of power in the District Court to act in the premises, without we adopt the absurd conclusion, that the power could

be exercised, when the sale is by the assignee, and at public auction, and does not apply when the sale is by the messenger of the court, and in the manner deemed most expedient by the court.

The second objection, denying the jurisdiction of the Circuit Court, under the 2d section of the Bankrupt Act, to revise the action of the District Court, remains to be considered.

This second section provides that the Circuit Court shall have "a general superintendence and jurisdiction of all *cases* and *questions* arising under this act."

The power is thus extended over the whole action of the District Court—nothing can be more comprehensive than the terms "all cases and all questions."

This unlimited power is to be exercised "upon bill, petition, or other process of any party aggrieved," and the case is to be heard and determined as in equity, by the Circuit Court or by any justice thereof, in term time or vacation.

This is the supervisory jurisdiction from which there is no appeal to this court, and extends to all cases and all questions on application of the party aggrieved, "*except when special provision is otherwise made.*"

The only enquiry therefore is, is there any special provision for such a case and such a question as is here presented, which excludes the court from the exercise of its general supervisory jurisdiction.

In this second section, after declaring the supervisory jurisdiction, it is said that the Circuit Court shall have also concurrent jurisdiction of all suits at law or in equity, brought by the assignee against any person claiming an adverse interest, or by such person against the assignee touching rights of property vested in the assignee.

The only other provision is, that an appeal may be taken to the Circuit Court "in all cases in equity," and writs of error "in cases at law under the jurisdiction created by this act." "*And any creditor whose claim is wholly or in part rejected*, or an assignee who is dissatisfied with the allowance of a claim, may appeal from the decision of the District to the Circuit Court."

We have thus fully cited the statutory provisions, that it may be made evident, that the case now presented does not fall within any exceptions to the supervisory jurisdiction.

The opinion of Judge Drummond so fully presents the grounds of his action, and the brief filed by Mr. Cooper so elaborately sustains it by argument, that further discussion is wholly unnecessary. We therefore submit that the appeal should be dismissed.

P. PHILLIPS,
For Appellee.

4-441

SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, A.D. 1876.

ALBERT CONRO AND WILLARD S. CARKIN, *Appellants,*

v.

CHARLES S. CRANE AND JEFFERSON HODGKINS, *Appellees*

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

BRIEF AND ARGUMENT FOR APPELLANTS ON MOTION TO DISMISS.

F. H. KALES,

Of Counsel for the Appellants.

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1877.

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Appeal from the Circuit Court of the United States for the Northern District of Illinois.

BRIEF AND ARGUMENT FOR APPELLANTS ON MOTION TO DISMISS.

STATEMENT OF THE CASE.

On the 24th of April, 1876, the Circuit Court, in the supposed exercise of its general superintendence and jurisdiction of all cases and questions arising in the District Court, sitting as a Court of Bankruptcy, made a decree against the appellants, from which this appeal is prosecuted. The chief ground of complaint here is, that the case before the Circuit Court was not one falling within its superintending jurisdiction; and, therefore, that its decree is subject to review by this Court, either for want of jurisdiction under section 4986 of the Revised Statutes; or, if it can be considered as a plenary suit and decree in the Circuit Court, then, that the decree is erroneous, because contrary to well settled rules of law and equity.

The contest in the District Court was one to which the assignee of the bankrupt estate was but a passive party. The real controversy was between the appellants and the appellees, who were strangers to that proceeding, and were out of court, but claiming rights against each other as bidders at a sale of the bankrupts' property. The contest was initiated in the District Court by a petition filed by the appellees for a summary order by rule to show cause, &c., to dispossess the appellants of property of the bankrupt estate, sold, delivered and paid for by them under an order of the District Court.

The only standing which the appellees had to file this petition was, that the District Court had previously made an order confirming a sale of the same property to them, at an inferior price, which they had failed to pay; and, the property not having been delivered, the District Court revoked that order, and sold to the appellants at a better price.

The District Court refused the summary relief thus prayed; and the case was then taken to the Circuit Court to be dealt with under its Superintending Jurisdiction.

The Circuit Court thereupon reversed the order of the District Court, and directed the sale to the appellants to be set aside, and required them to deliver the property to the appellees. The appellants then prayed the allowance of an appeal by the Circuit Judge which was denied; and, thereupon, application was made to the Honorable David Davis, Associate Justice, for the allowance of the appeal, and for a *supersedeas*, which were granted on the 19th of June, 1876.

STATEMENT OF PLEADINGS, ORDERS AND PROCEEDINGS.

In June, 1875, Fox and Howard were, by the District Court for the Northern District of Illinois, adjudged to be bankrupt; on the 16th of June Hancock was appointed provisional assignee, and took possession of the estate; on the 19th of June the District Judge made an order, directing the Provisional Assignee to advertise and receive sealed bids for the property (with some exceptions) as a whole or in parcels, until July 1, and then to submit them to the court; [Record p. —, top p. 49–50 of printed matter.]

On the 2d of July the assignee reported the biddings to the District Judge, and among them was one in writing, signed by the appellee, Hodgkins, alone, for the whole property, in these words: [* Top p. 54-5.]

"I propose to pay for the following named property, of the estate of "Fox and Howard, bankrupts, the sum of $40,000."

On the same day the Court entered an order concerning the acceptance of the bid of Hodgkins, requiring cause against it, if any, to be shown by July 9.

The material portion of that order is as follows: [Top p. 56-7.]

"In the matter of Harry Fox and
"William B. Howard, Bankrupts. } *In bankruptcy.*

"Upon reading and filing the report of Bradford Hancock, provisional "assignee of the estate and effects of said bankrupts, it is ordered that "all persons interested in the estate of said bankrupts show cause on or "before the 9th inst., why the bid of J. Hodgkins of $40,000 for the "property of the bankrupts, should not be accepted."

On the 9th of July, no cause to the contrary having been shown, the District Court entered an order that the sale to Hodgkins be confirmed, but making the delivery of the property conditional upon the receipt by the Provisional Assignee of the purchase price of $40,000.

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* This reference is to the page of the printed matter contained in the record.

That order is in these words: [Top p. 58-9.]

"In the Matter of Harry Fox.
"and William B. Howard, Bankrupts. } *In Bankruptcy.*

"Upon reading and filing the report of sale of Bradford Hancock, Pro-"visional Assignee, in the above entitled matter, and his report this day "presented and filed, showing due proof of publication and mailing of "notices of the entry of an order to show cause made herein on the 2d "instant, and after hearing objections to the confirmation of said report "of sale, and the court having duly considered the objections filed by "Stephen C. Walker to said sale, doth overrule the same. It is by the "court ordered that the sale of the property to J. Hodgkins, for the sum "of forty thousand dollars, mentioned in his bid therefor, and the said "report of the said Provisional Assignee thereupon, be, and the same are "hereby, in all respects approved, ratified and confirmed, and the said "Provisional Assignee, upon the receipt by him of the sum of forty thou-"sand dollars, is hereby authorized and directed to execute and deliver "to the said J. Hodgkins, all bills of sales or other transfers, necessary "to pass to and vest in the said J. Hodgkins, his heirs or assigns, all the "right, title and interest of said Fox & Howard, in and to said property, "and to deliver to the said Hodgkins the immediate possession thereof. "It is further ordered, that said Provisional Assignee pay over to the "clerk of this court the sum so received for said property, and that said "clerk deposit the same in the registry of this court, and that said pro-"ceeds be held *subject to all liens and claims of parties claiming any lien "or interest in said property, or any part thereof.*"

On the same day, the Provisional Assignee informed Hodgkins that his bid had been accepted, and showed him a certified copy of the order. Hodgkins, being an irresponsible person, in the service of Crane, the other appellee, requested the assignee to accompany him to Crane, "who" (Hodgkins then said), "would provide "and furnish the money for the bid." [Rec. top printed page 4.]

Crane, it appears, had previously directed Hodgkins to inform the assignee that no credit was wanted, but that "they could pay cash for everything." [Rec. top printed page 110.]

Notwithstanding this, neither Hodgkins nor Crane paid any part of their bid, nor made any deposit on account of it, although the assignee was ready to receive

the same and deliver the property. In addition to this, Crane had carefully avoided making himself personally a party to the proceedings in the District Court touching the bid or its acceptance.

Afterwards, the bid of Hodgkins not being paid, the Assignee, on the 12th of July, filed his petition in the District Court, stating that from the 9th he had repeatedly called on Hodgkins to pay the purchase money; that he had procured a certified copy of the order, and, presenting it to Hodgkins, had demanded payment, or a deposit on account, and had offered delivery of the property on payment of the bid; and further, that, Hodgkins having made default, he, the Assignee, had received from Conro and Carkin, and had entertained a bid of $40,500 for the same property, they also agreeing to assume and pay the custodian's charges, or liens then against it, and that this was more beneficial to the estate than the other bid. And thereupon, the petitioning Assignee prayed the Court to vacate the previous order, made on the 9th of July, and to enter an order directing a sale to Conro and Carkin, on the terms of their bid. The District Court, accordingly, on the 12th of July, made its order, as prayed by the Assignee, the material portion of which is as follows: [Top p. 158.]

"In the Matter of Harry Fox and
"W. B. Howard, Bankrupts.

"Upon reading the petition of Bradford Hancock, provisional assignee of said bankrupts, filed this 12th day of July, 1875, it is ordered:

"That the order heretofore entered in this proceeding, confirming the sale of certain property of said estate to one J. Hodgkins be, and hereby is vacated and set aside, and the sale of said property to said Hodgkins is hereby revoked and annulled.

"And it is further ordered that the bid of Conro and Carkin for said property mentioned in the report of said assignee, this day filed, be accepted, and that all of the property belonging to said estate, included in the bid of said J. Hodgkins, to wit:

[Here follows description, etc.]

"Be, and the same is hereby sold to the said Conro & Carkin for the "sum of $40,500, the purchasers assuming the claim of *Anson Fox* v. "*The Tug Hewett*, and assuming and agreeing to pay all custodian "charges on said property at South Chicago and Sheboygan. And it is "further ordered, that on the payment of the said sum of $40,500 to "him, the provisional assignee deliver said property, with proper bills of "sale thereof."

On the same 12th of July, Conro and Carkin paid in cash $40,500.00, the amount of their bid, and, receiving a bill of sale, took immediate possession of the property. [Top pages 9-16 of printed matter. Rec. p. —.]

On the 30th of July, Hodgkins alone filed his sworn petition in the District Court, making Conro and Carkin, and the assignee, parties, and claiming the property in his own right, and praying summary relief against Conro and Carkin. [Rec. pp. 354, 370.]

Afterwards, on the 9th of August, Hodgkins and Crane filed their bill in equity, in the Circuit Court, against the appellants, claiming that the bid of Hodgkins was for the benefit of Crane. This bill was sworn to by the complainants, and was the first authoritative disclosure of Crane's interest in the bid made by Hodgkins; but it was afterwards withdrawn. [Rec. pp. 371, 398.]

On the 10th of August, 1875, Hodgkins, without prosecuting his petition already filed in the District Court, filed, *in his own name*, a Petition of Review, in the Circuit Court, to set aside the order of July 12, directing a sale to Conro and Carkin, on which a hearing was afterwards had before the Circuit Judge. [Rec. pp. 414, 415.]

On the 13th of August the Circuit Court, on that petition, made its order, which is set forth on p. 17 of appellees' brief filed herein,—but that proceeding, being on the petition of Hodgkins alone, was there dropped.

On the 18th of August a new petition was filed in the District Court, against the appellants and the assignee, by Crane and Hodgkins jointly; alleging some interest in

Crane as a bidder through Hodgkins; admitting possession of the property from July 12th, by Conro and Carkin, the appellants; and praying for a rule on them, not only to show cause why the property should not be delivered to the petitioners, but also to show cause why the order in their favor, made by the District Court on the 12th of July, should not be set aside, etc. [Top pp. 1-14.]

On the 27th of August, 1875, the assignee answered, setting forth the sale to Conro & Carkin, under the order of the District Court, made on the 12th of July, and alleged:

1. That their bid was the highest, and most for the benefit of the bankrupt estate; that it had been execut ed and a complete delivery made.

2. That now the property might be in a worse condition from use, etc., and require an abatement in price to Hodgkins.

3. That the property was not in the hands of the assignee, and he could not deliver it as prayed for.

4. That Conro and Carkin had purchased, paid for, and taken possession of the property, in pursuance of an order which the District Court had the power to make, and that he (the assignee) was advised it was at least doubtful whether their title was not perfect, even if the District Court had erred.

5. That the assignee was advised it was doubtful whether the Court could, in a *summary* way, take the property from Conro and Carkin, and whether it would notbe necessary to litigate their title in a regular action or proceeding at law.

6. That Hodgkins & Crane had thus far, that is to say, until the 23d of August, 1875, when the answer of the assignee was sworn to, put up no money, and that they might retire from the purchase at any time; and the answer of the assignee suggests that the Court should

require them, as a condition of being heard, to pay their bid into Court, and such an order was afterwards made. [Top pp. 18-22. Rec. p. —.]

On the 13th of September, the appellants answered, claiming *inter alia:*

1. That the petitioners had no right or interest in the property, and no standing to call the respondents into Court.
2. That the respondents were strangers to the proceedings in bankruptcy; that they had bought, paid for, and taken possession of the property under the order and decree of the District Court, and that they could only be disturbed by a plenary suit at law, or in equity, and not by or under said petition, etc., and they gave notice that they should insist on that objection. [Top pp. 23-30. Rec. p. —.]

This matter afterwards came on to be heard in the District Court on the petition, answers and evidence; and on the 6th of March, 1876, the District Court directed the petition to be dismissed.

On the 9th of March, Crane and Hodgkins filed in the Circuit Court their Petition of Review, under Sec. 4986, R. S. U. S. [Top pp. 1-47. Rec. p. —.]

On the 18th of March, these appellants filed their motion to dismiss that petition for want of jurisdiction; and on the 6th of April, they filed their answer *inter alia*, protesting against the exercise of any jurisdiction over them. [Rec. pp. 71-77.]

Afterwards, on the 24th of April, 1876, the cause on this petition of review was heard before the Circuit Judge, who thereupon reversed and set aside the decree of the District Court, and amongst other things ordered: [Rec. p. 80.]

1. That the order of sale of July 12, 1875, to Conro and Carkin be reversed.

2. That the previous order of July 9, should remain in full force and effect, as originally made.

3. Declares title in Hodgkins under his bid of July 9, and directs the District Court to order the assignee to deliver him the necessary papers to show title, and also to deliver to him, or to Crane, the property in question, and ordering the District Court to make all needful rules and orders, *summary* or otherwise, to carry into effect the said order of July 9, 1875.

4. Declares the sale to Conro and Carkin to be annulled and set aside, and directs the sum of $40,500 of purchase money paid by them to be refunded upon certain conditions, viz: that the District Court might retain any part of said moneys of Conro and Carkin, or require security, to answer for any claim due from them growing out of the possession and use of the property, to any party or parties entitled thereto.

5. Recognizes the bid of Conro and Carkin as a better one for the bankrupt estate than that of Hodgkins, and recites that the petitioners, Crane and Hodgkins, having in the Circuit Court offered to make good the difference, orders a reference to the register in bankruptcy to ascertain and report what amount Crane shall pay to the assignee on that account. [Rec. pp. 80-82.]

The errors assigned upon the record in this case are, in substance:

1. That the Circuit Court had not jurisdiction to make the decree entered herein.

2. That the Petition of Review did not make or state a case within the superintending jurisdiction of the Circuit Court under Section 4986, R. S.

3. That the matters stated in the petition were not reviewable in the Circuit Court.

4. That the remedy, if any, was by appeal or writ of error from the District Court.

5. That the District Court had no jurisdiction to proceed in a summary way on a rule to show cause; and, it having dismissed the summary proceedings, the Circuit Court had no supervisory jurisdiction to reverse that order.

6. That the rights of the appellants to the property in question, became vested under an executed order of the District Court before the petition of review was filed; and that the Circuit Court exceeded its jurisdiction in entering a decree vacating that order.

POINTS.

I.

This case is not one falling within the Superintending Jurisdiction of the Circuit Court.

Rev. Stats., Sec. 4972, p. 969.
Id., Secs. 5062–5, p. 983.
18 Stat. at Large, Sec. 4, p. 178.
Smith v. *Mason*, 14 Wall., 419.
Stickney v. *Wilt*, 23 *Id.*, 150.
Marshall v. *Knox*, 16 *Id.*, 551.
Knight v. *Cheney*, 5. B. R., 305.
Blossom v. *Railroad Company*, 3 Wall., 196; 1 *Id.*, 655.
In re Dole, 11 Blatch., 499.
Coffey v. *Coffey*, 16 Ill., 141–4.
Day v. *Graham*, 1 Gilm., 435.
Troup v. *Ricardo*, 4 DeG., J. & S., 582.
Richards v. *Merriam*, 11 Cush., 582.

II.

Where a decree has been made by the Circuit Court assuming to exercise its supervisory power, still the ques-

tion whether the case is one falling within its Superintending Jurisdiction, remains open for trial in this Court on appeal.

Stickney v. *Wilt*, 23 Wall., 150.

III.

The Petition of Review, if otherwise proper, was, in this case, exhibited too late.

First National Bank v. *Cooper*, 20 Wall., 176.
Sandusky v. *Bank*, 23 *Id.*, 289.
Smallcombe v. *Olivier*, 14 Mee. and W., 77.

IV.

If the decree rendered by the Circuit Court could be treated as rendered in a plenary suit, then it can be reviewed in this Court on appeal; and, tested by the rules of law, it is erroneous.

Gray v. *Brignardello*, 1 Wall., 634.
Blossom v. *Railroad Company*, 1 *Id.*, 665.

ARGUMENT.

The whole case here may be reduced to these two general questions:

1. Whether the District Court itself had jurisdiction to proceed in a summary manner to adjudge the rights of property involved, as between the appellants and appellees; and should this be held in the affirmative; then,

2. Is the order of the Circuit Court, sitting as a Court of Review, such an one as the District Court could itself originally have made?

FIRST: The District Court had not jurisdiction to proceed summarily.

In this case there is no controversy between either of the parties to it and the assignee in bankruptcy. The adversary parties here were not parties to the proceedings in bankruptcy, excepting as they became so on account of successive bids, made at different times, for the whole of the bankrupt's estate. On the 9th of July, 1875, an order had been made by the District Court in Bankruptcy confirming the private offer to purchase previously made by Hodgkins, one of the appellees; on the 12th, that order was rescinded by the same court, and on that day, by its further order, the property was sold and actually delivered to the appellants, who, at the same time, paid for it in accordance with the terms of their bid, and of the order of confirmation passed by the court; and they now claim that thereupon the legal title to the property became vested in them as purchasers under the order and decree of the District Court sitting in Bankruptcy, nor is this disputed by the Assignee.

Upon compliance with this bid and the obtaining of possession in pursuance of the order of the court, that order became executed, and the right and title of the appellants became vested. Considered as *quasi* parties, the proceeding as to them was then at an end: *Blossom* v. *R. R. Co.*, 3 Wall., 196; 1 Id., 655. They were then as completely out of court as are the actual parties to a litigation upon the rendition of final judgment. For the purpose of trying any right or claim to this property, of either of the respective bidders under either of the orders which had been entered by the Court in Bankruptcy, that court, after the execution of its decree in the manner stated, had lost jurisdiction to proceed in a summary manner. As to these parties, the summary power of the court had ceased as completely as it ceases over the bankrupt when he has obtained his discharge.

In re Dole, 11 Blatch., 499, it is held that the summary power is over when the bankrupt is discharged; and, by analogy, the same rule may properly be applied to an innocent purchaser at a bankrupt sale, when the property has been paid for and delivered to him and he has departed with it. Then the order investing him with title must be considered final, and unless he has been guilty of fraud, unfairness or evil practice, amounting, actually or constructively, to a contempt, for which the court may lay its hand upon him, it cannot, in a summary way, again convene him to answer in that matter, or by summary order divest him of title. In opposition to such a proceeding the general rule applies, that courts will not, on motion, interfere summarily to adjudicate between litigating parties upon rights which may, and of right should be, investigated by an action at law, or a suit in equity.

Summary proceedings are mainly auxiliary, or, in some manner, incident to a pending suit; but, while they may

arise out of a suit, they can seldom be treated as a substitute for an action. *Coffey* v. *Coffey*, 16 Ill., 141–4; *Day* v. *Graham*, 1 Gil., 435; Broom's Com., pp. 226–7.

"As there are certain injuries," says Blackstone, "of "such a nature that some of them furnish, and others "require, a more speedy remedy than can be had in the "ordinary forms of justice, there is allowed, in these "cases, an extra-judicial or eccentrical kind of remedy."

Of this description are summary remedies, and, as they are contrary to the general course of the common law, they ought to be repressed within reasonable boundaries.

Hence it is, that this Court has held that the District Court, sitting in bankruptcy, has no jurisdiction to proceed in a summary manner upon a rule, to show cause obtained by the assignee himself against a stranger, or person not a creditor, claiming adverse rights in the same property; *Smith* v. *Mason*, 14 Wall., 419; *Stickney* v. *Wilt*, 23 Wall, 150; *Knight* v. *Cheney*, 5 B. R., 305.

Where the bankrupt or his assignee can have no interest in, or benefit from, the controversy, but, perhaps, the reverse, and the contest is wholly between strangers, it would seem to follow, *a fortiori*, that the District Court can have no summary jurisdiction; and, therefore, this proceeding, initiated and prosecuted by the appellees, under a rule to show cause, and against the protest of the appellants, was wholly outside of the jurisdiction conferred upon the District Court, sitting in bankruptcy; and that Court, for whatever reason, having declined to proceed, and having dismissed the petition of the appellees, no case was made falling within the superintending jurisdiction of the Circuit Court.

It is claimed by the appellees here, that the District Court, sitting in bankruptcy, possessed the summary jurisdiction and authority which they, by their petition, invoked; and that this jurisdiction arises both from the

statute, and also by analogy to that exercised by courts of equity in England, and in this country, over judicial sales.

The first position is untenable, and the latter pretension is not sustained by authority, but is directly opposed to the case of *Troup* v. *Ricardo*, 4 DeG., J. & S., 494; where it is held that the powers of a Court of Chancery, in such cases, are not extended by implication to the Insolvent Debtors' Court, even in cases of fraud. The Lord Chancellor there says:

"The issue raised by the plaintiff, that the assignees "have fraudulently made away with his property at an "under value, could not have been tried by the Insolvent "Debtors' Court, because it would be necessary for the "trial of that issue, that the party to the asserted fraud, "namely, the purchaser, should be present for the pur- "pose of restitution; but the Insolvent Debtors' Court "would have no authority to convene the purchaser."

So here, upon the completion of the sale, and delivery of the property to the appellants on the 12th of July, the District Court had no authority, in a summary way, to convene the purchasers, so as to compel them to restitution, in case an issue sufficient for that purpose were found against them.

But, if the rule of practice adopted by courts of equity in such cases may be followed by the Bankrupt Court, still the Court of Chancery, it is believed, has never assumed or exercised summary jurisdiction to decide between two strangers claiming rights as bidders at a judicial sale, after the order of sale had been executed and the property delivered to one of the contestants; and more especially, where the interference has been asked by one who has merely offered an inferior price.

Such a proceeding by the Bankrupt Court would be contrary to section 4, 18 Stats. at Large, p. 178, where it is expressly provided that the judge may order a re-

sale, so that the property sold shall realize the largest sum.

Indeed, the Supreme Court of Massachusetts, in *Richards* v. *Merriam*, 11 Cush., 582, in passing upon its superintending jurisdiction, which was similar to that conferred upon the Circuit Court, declined to interfere to annul a sale upon the ground that that was a matter within the discretion of the judge or Commissioner of Insolvency. On that subject the court held the following language:

"It is a matter for the special judgment and discre-
"tion of the assignee, under the direction of the Com-
"missioner in Insolvency, and so the duty of its revision
"neither devolves nor is conferred on any other tribunal."

The summary jurisdiction of both the District and the Circuit Court was conferred in order to hasten the settlement of the bankrupt's estate, and not for the determination of controversies between strangers. The counsel of the appellees, however, on pages 48–9 of his brief, says:

"It is a fair statement to make of the case that Crane
"and Hodgkins did have a controversy with the estate
"and the court, through the provisional assignee, their
"representative."

If that hypothesis be correct, express provision was made for the case by Section 4979, Revised Statutes, which enacts as follows:

"The several circuit courts shall have within each dis-
"trict concurrent jurisdiction with the District Court
"* * * of all suits at law or in equity brought by an
"assignee in bankruptcy, against any person claiming
"an adverse interest, or by such person against an as-
"signee, touching any property or rights of the bank-
"rupt transferrable to or vested in such assignee."

A reference to authorities is not necessary to show

that where express provision has been otherwise made, the summary power cannot be exercised; but, see *Knight* v. *Cheney*, 5 B. R., 305.

2. Whether a given case before the Circuit Court is one falling within its superintending jurisdiction, is a question which is always open for trial in this Court on appeal. *Stickney* v. *Wilt*, 23 Wall., 150.

And, it is equally clear, that a case not originally within the power or jurisdiction of the Bankrupt Court cannot be brought within its jurisdiction by an order of the Circuit Court, rendered in the supposed exercise of its superintending jurisdiction.

3. The Petition of Review in this case was exhibited in the Circuit Court too late; it was filed on the 18th of August, 1875, upwards of a month after the order of sale of the Bankrupt Court had been finally executed and the property delivered to the appellants.

No time, within which the Petition of Review must be exhibited, had been fixed by the statute, and that omission has caused some difficulty, and has attracted the observation of this Court.

In *First National Bank* v. *Cooper*, 20 Wall., 176, it is said:

"Undoubtedly the application should be made within "a reasonable time, in order that the preceedings to set- "tle a bankrupt's estate may not be delayed; but neither "the Act of Congress, nor any rule of this Court, deter- "mines what that time is at present; therefore, it must "be left to depend upon the circumstances of each case. "Perhaps, generally, it should be fixed in analogy to the "period designated within which appeals may be taken."

The time for praying an appeal from the District to the Circuit Court in cases under the bankrupt law is ten days, and notice must be given to the assignee or oppo-

site party within ten days after the entry of the decree appealed from. That was not done in this case.

In *Sandusky* v. *Bank*, 23 Wall. 289, the court in considering this question, say:

"Any order made in the progress of the cause may "be subsequently set aside and vacated, upon proper "showing made, provided rights have not become vested "under it which will be disturbed by its vacation."

This view is fully supported by the case of *Smallcombe* v. *Olivier*, 13 Mee & W., 77.

In the present case the order of sale had been completely executed, upwards of thirty days before the petition of review was exhibited in the Circuit Court.

To meet this argument, the counsel of the appellees, on page 16 of their brief, make the suggestion, "that "application was made to the district judge before the "property was delivered." This, however, considered in any legal sense, is a mistake. There was, as the record discloses, merely a conversation had with the district judge on the occasion referred to.

Another argument advanced by the appellees, in favor of the peculiar jurisdiction exercised in this case by the Circuit Court is, that on the facts of this case, neither a court of law nor of equity could grant any relief to the appellees; and hence it is argued, that this case must be held to fall within the superintending jurisdiction of the Circuit Court. But the more just conclusion from these premises is, that the appellees never had a case or grievance of any sort to be redressed by a court.

It was not the intention of Congress, in conferring the superintending jurisdiction, to create a tribunal to make decrees not warranted by the general rules of law or equity. Such a jurisdiction would be repugnant to the principles of the common law, and would savor more of the power exercised by the Praetor.

4. If the decree rendered by the Circuit Court could be treated as a decree in a plenary suit, then that decree can be reviewed, on appeal, by this court.

In that case, the decree, when tested by the general rules of law, is erroneous, because it wholly disregards that protection which is universally accorded to purchasers at judicial sales, even where the judgment of the inferior court is reversed.

SECOND: The District Court could not itself originally have made the order which it was directed to do by the Circuit Court, hence, the order of the Circuit Court was extra-judicial.

By an ancient rule, uniformly adhered to by this court, and exemplified by the cases of *Gray* v. *Brignardello*, 1 Wall., 634, and *Blossom* v. *R. R. Co.*, 1 *Id.*, 665, purchasers, such as were the appellants, are entitled to protection. They had paid upwards of forty thousand dollars, cash, for this property. There is no dispute but that the price they paid was fair; they took possession of the property at once, and, after holding it for nearly a year, and employing it in their business, their title was summarily set aside by the Circuit Court, and no adequate provision, even, was made for refunding to them the purchase money, but, on the contrary, the District Court was directed to retain any part of it, or require security from them to answer any claim growing out of their possession and use of the property.

Such a decree, the District Court itself was powerless to render; the law had conferred upon it no jurisdiction authorizing it to do so; and hence the decree of the Circuit Court itself is void, for want of jurisdiction to order the District Court to make such a decree.

It will at once be conceded that an order of the Circuit Court, sitting in review, which should, for example,

direct the infliction of capital punishment or the awarding of a writ of possession, etc., would be extra-judicial, and subject to review by this court, on appeal. While the order of the Circuit Court is not so obviously outside of or beyond its jurisdiction when sitting as a Court of Review, still it must be conceded that if the terms of its order are such as could not, for want of jurisdiction, originally have been entered by the District Court, then its order in that behalf is void, for want of jurisdiction, and may be set aside by this court, on appeal. This court is only barred from reviewing the decrees of the Circuit Court made in the exercise of its Superintending Jurisdiction, when they are, in their form and effect, confined within the limits of judgment permitted to that special jurisdiction. Whatever is beyond that is void, and the question whether a particular order is within or beyond these limits or boundaries, must be considered as open on appeal to this court, and is properly presented for adjudication on appeal when regularly taken.

F. H. KALES,
Of Counsel for the Appellants.

4-441

IN THE

SUPREME COURT

Of the United States,

DECEMBER TERM, A. D., 1876.

Appeal from the Circuit Court of the United States
for the Northern District of Illinois.

ALBERT CONRO AND WILLARD S. CARKIN,
APPELLANTS,
—vs.—
CHARLES S. CRANE AND JEFFERSON HODGKINS.
APPELLEES.

BRIEF AND ARGUMENT FOR APPELLEES

ON MOTION TO DISMISS APPEAL.

JOHN S. COOPER, of Counsel for Appellees.

CHICAGO:
BEACH, BARNARD & CO., LEGAL PRINTERS, 98 RANDOLPH STREET.
1877.

IN THE

Supreme Court of the United States.

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—VS.—
CHARLES S. CRANE AND JEFFERSON HODGKINS.

BRIEF AND ARGUMENT FOR APPELLEES

ON MOTION TO DISMISS APPEAL.

STATEMENT OF CASE.

The appeal in this case is from an order or decree of the court below, entered in a bankruptcy cause, in the exercise of its superintending jurisdiction over matters in bankruptcy, conferred by the first clause of the 2d section of the Bankrupt Act, (now Sect. 4,986 U. S. Rev. Stats.)

The controversy was over two different orders of sale of the same property belonging to the bankrupt's estate, entered by the District Court of the United States for the Northern District of Illinois, after the adjudication of bankruptcy, but before the election or appointment of the assignee, the sale being ordered under the authority conferred by Section 5,065 Rev. Stats., giving to the

District Courts power, when satisfied that the estate of the debtor is of a perishable nature, or liable to deteriorate in value, to order the same to be sold under the direction of the messenger or assignee, as the case may be.

By one order, the District Court confirmed a sale which it had previously ordered *nisi*, and directed the officer who was acting as messenger, (styled in the record "the "provisional assignee,") to deliver the property to the purchaser, and receive the purchase price. By the other order, entered three days later, at the instance of the provisional assignee, and without any notice being given to the first purchaser, the court rescinded and set aside the first sale, and directed another sale to be made of the property to other persons.

The parties to the controversy were, on the one side, the present appellants, who obtained possession of the property, and claimed title thereto under the second order of sale, the provisional assignee, and one of the bankrupts, in whose interest, it was claimed, the scheme was gotten up and executed, which resulted in canceling the first sale, making the second, and transferring the possession of the property to appellants. The other parties to the controversy were the appellees, who claimed title to the property under the first confirmed order of sale, insisting that its rescission was accomplished and a re-sale ordered to the appellants, by the fraudulent misrepresentation of the provisional assignee to the District Court, done in pursuance of a dishonest plot to prevent appellees from getting the property, and to which plot the appellants and one of the bankrupts, together with the provisional assignee, were parties.

The controversy has been twice to the Circuit Court on petition of review. To the first petition, the appellants and their co-respondents, the provisional assignee and the bankrupt, appeared by counsel without objection to the

jurisdiction of the Court, which entered an order—on it being conceded that the first order of sale had been set aside, and a re-sale ordered, without notice, to the first purchasers, the appellees—that the District Court should set aside or open its second order rescinding its former order of sale to appellees, and let the latter in to be heard on the question as to whether the sale to them should be set aside or not.

That hearing was had before the District Court on voluminous proofs taken on the part of the appellants, the appellees and the provisional assignee. The District Court, on the merits of the controversy, held that it had acted rightly in rescinding the order of sale to appellees, to whom it refused any relief. A second time they brought their petition of review to the Circuit Court, and it is from the final order or decree of that Court upon the second petition of review, that the present appeal was taken by the appellants.

The above general statement of this controversy, we presume, will be sufficient to bring before the Court all the facts necessary to be considered on this motion. We also suppose that the counsel for appellants would concede that the foregoing contains a correct and sufficient statement of the controversy for the purposes of this motion.

In order, however, that any differences—which may arise between counsel as to the record-facts in the case—shall be easily determined by the Court, we add the following detailed statement, with references to the record, for verification.*

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* By agreement with the opposing counsel, we submit, with the copies of our brief, printed copies of the Record used in the Circuit Court, and which is incorporated in the Record in this Court, and shall refer thereto as "top page— " We also submit herewith printed copies of the Opinion and Decree of the Circuit Court appealed from.

Statement of Facts.

On the 5th of June, 1875, Harry Fox and William B. Howard, partners, composing the firm of Fox & Howard, were adjudged bankrupts by the District Court for the Northern District of Illinois, on a petition filed against them by certain of their creditors. On the 16th of June, and before the election or appointment of the assignee, Bradford Hancock was appointed by that court, what is styled in that district, provisional assignee. A number of tug-boats, dredges, pile-drivers and other machinery used in the construction and improvement of canals, rivers, bridges, etc., and belonging to the estate of the bankrupts, having, amongst other property, come into his possession as provisional assignee, he, on the 19th of June, applied by petition to the District Court for leave to advertise for bids for the property in order to effect a sale of the same, which he stated it was for the interest of the estate to make at the earliest practicable moment, because of the expense involved in keeping the property, and for the additional reason that it was liable to sell for less at a later season of the year. He stated that he believed the property could be sold to better advantage by advertising for bids than by sale at public auction, on account of it being situated in different States, and because so much of it as was in the City of Chicago in that District, was badly scattered about. (See Rec., and top page 47-49.)

The same day on which the petition was filed, the District Court entered an order in said bankruptcy matter of Fox and Howard, of which the following extract is all that is material to this inquiry. (See Rec., and top page 49-50.)

"It is by the court ordered that the said Bradford Hancock, as such provisional assignee, be and he is hereby authorized and directed to advertise for and receive sealed bids for the personal property and assets described in said petition (except as hereinafter stated), either as a whole or in parcels, until the 1st day of July, A. D. 1875, at which time said bids shall be

"submitted to and opened by the judge of this court, and the said bids "accepted or rejected, as this court shall direct. And the said assignee is "further directed to publish notice thereof in the *Chicago Times* and *Chicago* "*Tribune* on each intervening Sunday between this date and said 1st day of "July, and also daily in the *Chicago Inter-Ocean* and *Evening Journal*, and "that he likewise send notice thereof by mail to all known creditors of said "bankrupts."

On July 1st, the provisional assignee took the bids which had been received for the property advertised, to the District Judge, who opened the same, and directed the provisional assignee to report thereon. (Hancock's Ev., Rec., p. 228, top page 228.)

On the next day, July 2d, Hancock filed his report, recommending three bids for parts of the property, the only bid for all the property being the sum of $33,300. (See Report of Prov. Assignee, Record, and top page 50-53.)

On the same day he filed a supplemental report, stating that since the making of his former report, he had received from J. Hodgkins a bid for the whole of the property of $40,000, and annexed to the supplemental report was the bid so received. He further stated that the bid amounted to from $8,000 to $10,000 more than the aggregate of the highest bids for the same property in parcels, and was a fair price under the circumstances; that he recommended to the Court its acceptance, and that he be authorized to make bill of sale and delivery of the property to the purchaser upon payment of the amount of the bid. (See supplemental report and copy of Hodgkins' bid, Rec., and top page 54-55.)

On the filing of the supplemental report and the bid of Hodgkins, the Court entered the following order on the same day, July 2d. (See Rec., and top page 56-57.)

"IN THE MATTER OF
"HARRY FOX AND WILLIAM B. HOWARD, BANKRUPTS. } *In Bankruptcy.*

"Upon reading and filing the report of Bradford Hancock, provisional "asssignee of the estate and effects of said bankrupts, it is ordered that all

"persons interested in the estate of said bankrupts show cause on or before "the 9th inst., why the bid of J. Hodgkins of $40,000 for the property of the "bankrupts should not be accepted."

"And, it is further ordered that said provisional assignee give notice of "this rule by mail to all known creditors of said bankrupts, and by publica- "tion of a notice thereof in the *Chicago Daily Inter-Ocean* und *Chicago Daily* "*Evening Journal*, newspapers printed and published in the City of Chicago, "in said District."

Accordingly, on Friday, the 9th of July, the provisional assignee filed his report in said matter in the District Court, stating that he had given notice of the order of July 2d, by causing the order itself to be published in the newspapers as directed, and by mailing a copy of the order to each creditor of the bankrupts; that no objections had been filed to the proposed confirmation of the sale to J. Hodgkins, upon his bid of $40,000 (with one exception, which was a claim for a lien on part of the property, not material here,) "and that J. Hodgkins, the highest and best bidder "for the property mentioned in such report, now stands "ready to pay over the purchase money for the same." Wherefore the provisional assignee prayed that the court would confirm the sale to Hodgkins, and that the provisional assignee be authorized to execute and deliver to him proper bills of sale, and the property, upon the receipt of the $40,000 bid therefor.

In compliance with its former order of sale *nisi*, and the above report and prayer of the provisional assignee, the District Court at 2 o'clock in the afternoon of that day, Friday, July 9th, entered the following order confirming the sale to Hodgkins. (See for the order, Rec. and top page 58-59. For the time of day when the order was entered, Hancock's Ev., Rec., pp. 251 and 252; top page 231-232.)

"IN THE MATTER OF
"HARRY FOX AND WILLIAM B. HOWARD, BANKRUPTS. } *In Bankruptcy.*

"Upon reading and filing the report of sale of Bradford Hancock, Provis- "ional Assignee, in the above entitled matter, and his report this day pre-

"sented and filed, showing due proof of publication and mailing of notices "of the entry of an order to show cause made herein on the 2d instant, and "after hearing objections to the confirmation of said report of sale, and the "court having duly considered the objections filed by Stephen C. Walker to "said sale, doth overrule the same. It is by the court ordered that the sale "of the property to J. Hodgkins, for the sum of forty thousand dollars, men-"tioned in his bid therefor, and the said report of the said provisional as-"signee thereupon, be, and the same are hereby, in all respects approved, "ratified and confirmed, and the said provisional assignee, upon the receipt "by him of the sum of forty thousand dollars, is hereby authorized and "directed to execute and deliver to the said J. Hodgkins, all bills of sales "or other transfers, necessary to pass to and vest in the said J. Hodgkins, "his heirs or assigns, all the right, title and interest of said Fox & Howard, "in and to said property, and to deliver to the said Hodgkins the immediate "possession thereof. It is further ordered, that said provisional assignee "pay over to the clerk of this court the sum so received for said property, "and that said clerk deposit the same in the registry of this court, and that "said proceeds be held subject to all liens and claims of parties claiming any "lien or interest in said property, or any part thereof."

J. Hodgkins, to whom the sale of the property was by the above order "approved, ratified and confirmed," is one of the appellees in this appeal, and was, at the time of these transactions, in the employment of Charles S. Crane, the other appellee, as the superintendent of dredging for the latter; who owned one dredge, and was desirous of procuring additional property of the same character, with which to carry on the business of dredging. (Record, p. 83, top page 63.)

Crane accordingly directed Hodgkins, when bids for the property were solicited by the advertisement of the provisional assignee as directed by the Court, to bid on such property as in Hodgkins' judgment they would require, which Hodgkins did, he bidding on only a part of the property. (Record, pp. 83-84, top page 63-64.)

After the bids had been opened by the District Judge on July 1st, the provisional assignee solicited from Hodgkins a "sweeping bid for the whole property—property "included in the bid made after that—for $40,000," and

that he, Hancock, the provisional assignee, would recommend its acceptance by the Court. Hodgkins told him he would have to see Crane first. (Rec., 102, top page 82.)

Hodgkins accordingly saw Crane, who, on consideration of the matter, directed the former to put in such a bid for the whole of the property in controversy, for him, Crane. (Rec., 84 and 102; top page 64 and 82.)

The bid already mentioned for the whole property for $40,000 was accordingly delivered to the provisional assignee on the next day, July 2d, signed "J. Hodgkins."

As there has been much controversy over the fact that the bid was in the name of Hodgkins, the agent, instead of Crane, the principal, it may not be amiss to refer the Court to the circumstances—as detailed in the evidence—under which it came to be so made.

Crane did not direct Hodgkins as to the form of the bid, and "never thought about whose name the bid should "be in." Nor did he make any secret that the bid was his. Crane was a man of wealth, who could raise $40,000 on a few hours' notice, whilst Hodgkins was his employee, working on a salary, contingent upon the profits of the dredging business, and without means. (Record, 84; top page 64.)

On the morning of July 2d, Hodgkins met with James E. Miller and Dorr A. Kimball, two former employees of Fox and Howard, the bankrupts, and requested Mr. Kimball to write the bid, which the latter did; and when it came to the signature, Hodgkins asked Kimball to sign his, Hodgkins', name to it, and then these three persons went to the office of the provisional assignee, and gave the latter the bid thus written, telling him that it was a responsible bid, authorized—or, in the language of the witness, "backed"—by Mr. Crane. (Rec., pp. 103, 113, 115, 116, 125, 132, 133, 142 and 143; and top pages 83, 93, 95, 96, 105, 112, 113, 122 and 123.)

There is no testimony whatever in the record that any concealment was intended of Crane's responsibility for the bid, except that it was not signed with his name, but with the name of a man known to the community to be in his service. That the bid thus made in the name of Hodgkins was known to be the bid of Crane by the appellants in this case a day or two before it was confirmed, is conceded.

Fox, one of the bankrupts, shortly after the conditional order of sale of July 2d was entered, having learned that the bid in the name of Hodgkins was the bid of Crane, called upon the latter, and through the influence of a relative of Crane interceded for an interest in the property, if Crane should get it on his bid; and stated that he, Fox, had friends who would assist him to purchase an interest. Crane, willing to oblige his relative, replied that he would let Fox have a part of the property if he should get it on his bid; or all of it, if Fox's friends would buy out the dredge which Crane then owned. (Rec., pp. 84-86; top pages 64-66.)

In consequence of this interview, and in a day or two thereafter, Crane was invited by Fox to meet two friends of the latter, who turned out to be Albert Conro, a resident of the city of Milwaukee, Wisconsin, and Willard S. Carkin, residing temporarily in the city of Chicago, and an inmate of said Fox's family, living at the latter's house, and both being the appellants herein.

A protracted interview took place, the result of which was, as testified by Crane, that the bid should stand as it then was until after Friday, the 9th, the day set for confirmation of the sale by the court, *nisi*, &c., when an arrangement could be made to give Fox an interest, if the sale should be confirmed. (Rec., pp. 85 and 89, top pages 65 and 69.)

Conro and Carkin however, swear that the result of the

interview was that Crane gave them an option, either to take the property off his hands at the amount of his bid, if the sale should be confirmed, also taking his dredge at a certain price, and his dredging contracts off his hands, or to form a company to operate the property, in which Crane was to have an interest; and that they, Conro and Carkin, agreed absolutely to do one or the other. (Rec. pp. 183, 184 and 213; top pages 163, 164 and 193.)

After the order confirming the sale was entered, in the afternoon of Friday, July 9th, the provisional assignee went with Hodgkins to Crane's office to see about delivering the property and receiving the purchase price. Mr. Crane was not in, but the parties saw and had an interview with William H. Woodbury, who was in the service of Crane as book-keeper, and general manager in the latter's absence. Woodbury assured Hancock, the provisional assignee, that Mr. Crane was ready to take the property and pay for it any time. After waiting for Crane to come in for some time, Hodgkins and Hancock left the office. The next day, Saturday, July 10th, late in the afternoon, Hancock saw Crane for the first time; and by him was assured that he was ready to take the property, and both Crane, Hancock and George W. Crane—the three persons present at that interview—agree that when Hancock left the office, it was under an agreement that Crane was to meet Hancock on Monday morning, July 12th,—"early Monday morning" Hancock says—and make a deposit on account of the bid, and begin to receive the property.

(For interview at Crane's office on Friday, see Rec., pp. 103, 104 and 149-151; top pages 83, 84 and 129-131.)

(For interview of Saturday, July 10th, see Rec., pp. 87 and 97-101 and 277-279; top pages 67 and 77-81 and 257-259.)

On the afternoon of that same Saturday, July 10th, Crane had an interview with Fox, in which the former

stated certain terms and conditions upon which Fox should take an interest in the property. which were not satisfactory to the latter. (Rec., pp. 86 and 90; top pages 66 and 70.)

On the evening of that day Crane sent Hodgkins and James E. Miller to see Conro at Milwaukee, to learn what he proposed to do towards assisting Fox to obtain an interest in the property, the sale of which had been confirmed. They saw him on the following day, Sunday, July 11th, and he expressed himself as willing to assist Fox to the amount of $30,000, and that he would come to Chicago the evening of the following day or on the day after. (Rec., pp. 108, 109 and 134; top pages 88, 89 and 114.)

On the same day, Sunday, July 11th, Willard S. Carkin, one of the appellants, sent an invitation to Hancock, the provisional assignee, to come to Fox's house; and there, on the evening of that day, Hancock, Carkin and Fox had an interview, in which, as Hancock and Carkin both testify Hancock negotiated another sale of the property for $40,500, to Carkin, the latter to let Hancock know early the next morning, whether he would make the purchase. (Rec., pp. 174-177, and 196 to 201; top pages 154-157, and 176-181.)

And Hancock testifies as follows, Carkin not denying it, and Fox not having been introduced as a witness. (Rec., p. 262; top page 242.)

> " Told him " (Carkin) " if he would put in that bid for forty thousand " five hundred dollars, and put up fifteen hundred dollars, I would ask the " court to vacate the sale, and if he and Hodgkins wanted to make any " higher bids, all right. He said he wouldn't do it; he said the only way " he would make a bid on that property was to have it—to have the bid pre- " sented to the court; *he wouldn't bid if there was any competition;* he " would give so much; but wouldn't do anything more to have the sale " vacated. He wanted, when I asked to have the sale of Hodgkins " vacated, to have the sale to him confirmed; he said he wouldn't make an

" offer unless I would ask to have the sale confirmed. He said if he con-
" cluded to do so he would be around to my office in the morning before ten
" o'clock. *I told him the court went on the bench at ten o'clock, and I would*
" *have to get there before ten o'clock, or otherwise we wouldn't get to the court*
" *before one. He said if he concluded to put in a bid of that kind, he would*
" *be around there, before ten o'clock.*"

On the following morning, Monday, July 12th, at about half-past nine o'clock, as testified by Hancock, Carkin came to the latter's office with a certified check for $15,000, and a bid for the property, in the name of Conro and Carkin. After seeing the District Judge, Hancock had his attorney prepare a petition praying the Court to rescind the confirmed sale to Crane and Hodgkins, and make a new sale to Conro and Carkin; also an order rescinding the former sale and making a new sale; and had the one filed and the other entered, and $40,500 in certified checks in hand, paid by Carkin, by eleven o'clock of that morning. (Rec., p. 263; top page 243.)

The following are copies of the petition of the provisional assignee, with the bid of Conro and Carkin thereto annexed. (Rec., pp. 59 and 60; top page same.)

" UNITED STATES DISTRICT COURT,
" NORTHERN DISTRICT OF ILLINOIS. } ss.

" IN THE MATTER OF
" HARRY FOX AND W. B. HOWARD, BANKRUPTS. } *In Bankruptcy.*

" TO HON. H. W. BLODGETT: Bradford Hancock, provisional assignee
" of said bankrupts, respectfully shows unto your Honor that on the 9th day
" of July instant, an order was entered herein confirming the sale of certain
" property of said bankrupts therein enumerated to one J. Hodgkins, for the
" sum of forty thousand dollars. That petitioner has since said order was
" entered repeatedly called upon said Hodgkins to pay over to petitioner
" said purchase money, and that on the 10th day of July, 1875, petitioner
" procured a certified copy of the order confirming said sale, and presented
" it to said Hodgkins, and demanded payment of said sum of forty thousand
" dollars, or a deposit on account thereof, and offered delivery of the prop-
" erty upon payment. That said Hodgkins has failed and neglected to pay
" to petitioner said sum of forty thousand dollars, or any part thereof, or to
" make any deposit; and petitioner further shows that he has received from
" Conro & Carkin a bid of forty thousand five hundred dollars for the prop-

" erty heretofore sold to said Hodgkins; said bidders agreeing to assume the " custodian charges on property; which said bid is hereto attached.

" Petitioner further shows that he believes it for the best interest of the " estate that the order confirming said sale to said Hodgkins be set aside, " and that said property be sold to the said Conro & Carkin.

" Wherefore petitioner asks that an order be entered herein setting aside the " confirmation of the sale to said Hodgkins, and revoking said sale, and that " petitioner sell said property to Conro & Carkin, according to the terms of " said bid, and that petitioner be authorized to deliver all of said property " heretofore ordered to be sold to said Hodgkins, to said Conro & Carkin, " on the payment by them of said sum of $40,500.

" BRADFORD HANCOCK,

" *Prov. Assignee.*"

" UNITED STATES OF AMERICA, } ss.
" NORTHERN DISTRICT OF ILLINOIS, }

" Bradford Hancock, being duly sworn, deposes and says that he has read " the foregoing petition, and knows the contents thereof, and that the same " is true, except as to those matters therein stated on information and " belief, and those he believes to be true.

(Signed) " BRADFORD HANCOCK."

" Subscribed and sworn before me, this 12th day of July, A. D. 1875."

" COPY OF BID REFERRED TO IN THE PETITION.

" CHICAGO, July 12th, 1875.

" *To Bradford Hancock, Esq. :*

" DEAR SIR : We propose to pay for the Fox & Howard dredging stock, " with its tools and appliances, etc., as bid for by Hodgkins, the sum of forty " thousand five hundred dollars, on presentation of bill sale in due form. " We assuming the claim of Anson Fox on tug Hewett; also custodian " fees at South Chicago and Sheboygan. We make this bid, understanding " that Mr. Hodgkins has not complied with his proposition."

(Signed) " CONRO & CARKIN."

The petition was not verified by oath or affirmation. (Rec., p. 178; top page, 158.)

The following is the order that was entered by the District Court, upon the *ex parte* petition of Hancock, not even verified, and without any notice to or knowledge of Crane or Hodgkins:

" UNITED STATES DISTRICT COURT, } ss.
" NORTHERN DISTRICT OF ILLINOIS, }

" IN THE MATTER OF
" HARRY FOX AND W. B. HOWARD, BANKRUPTS. }

" Upon reading the petition of Bradford Hancock, provisional assignee of " said bankrupts, filed this 12th day of July, 1875, it is ordered :

" That the order heretofore entered in this proceeding confirming the sale " of certain property of said estate to one J. Hodgkins be, and hereby is " vacated and set aside, and the sale of said property to said Hodgkins is " hereby revoked and annulled.

" And it is further ordered that the bid of Conro & Carkin for said prop- " erty mentioned in the report of said assignee, this day filed, be accepted, " and that all of the property belonging to said estate, included in the bid of " said J. Hodgkins, to wit:

[" The following list was left to be inserted when the order was prepared.]

" No. 11. Dredge and all tools and patterns complete.
" " 3. " " " " "
" " 6 " " " " "
" " 2. " " " " "
" " 1. Pile Driver, Scow, and Leaders, &c.
" " 2. " " "
" " 4. " " "
" " 5. " " "
" " 6. " " "
" Dolly Varden No. 12, all patterns.
" " " No. 2, all patterns.
" No. 8. Dump Scow, with the lines, &c., for same.
" " 9. " " " "
" " 11. " " " "
" " 13. " " " "
" " 15. " " " "
" " 17. " " " "
" " 18. " " " "

" Derrick Scows, Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10; Floats, Nos. 1, 2 and 3; " Dredge Hulls, Nos. 1, 2, 3, 4 and 5; Tugs G. B. McClellan, Leonard Ev. " erett, Wm. Hewett, and all ropes, tools, &c., &c. Old machinery, and stuff " at yard, North Branch. 1 Clam Scow dredge and tools, 1 Steam derrick, " dredge and tools, and all patterns, duplicate machinery, spuds, dippers, " hand car, cranes, &c., and stuff belonging to dredge and pile driver's ma- " chinery. (This bid does not include *machinery* in *the shop* belonging to " shop. 1 n timber, plank and pile in S. Branch yard, or office fixtures,) Be " and the same is hereby sold to the said Conro & Carkin for the sum of $40,- " 500, the purchasers assuming the claim of *Anson Fox* v. *The Tug Hewett*, " and assuming and agreeing to pay all custodian charges on said property at " South Chicago and Sheboygan. And it is further ordered, that in the pay- " ment of the said sum of $40,500 to him the provisional assignee deliver " said property, with proper bills of sale thereof."

That order, thus procured, and thus entered, is the foundation of all the right or title which Conro and Carkin,

the appellants, have ever had, *or claimed to have*, in the property in controversy.

Mr. Crane on that Monday morning, in entire ignorance of what had been done by Hancock, the officer of the District Court, appeared at the latter's office, in company with Hodgkins and Miller, at a a few minutes after eleven o'clock, with $20,000 in certified bank cheques, with which to make the deposit on account of his purchase, and begin to receive the property, as he and Hancock had arranged the previous Saturday evening.

Crane presented the bank cheques, and stated the purpose he had come for, when Hancock replied, "You are "too late, the property is sold and paid for in the Court." On being reminded of the arrangement of the previous Saturday evening, to receive a payment on account of the bid, on that morning, Hancock replied that "the morning "was gone." Surprised and indignant, Crane asked if there was no redress, and was answered in the negative. Crane and Hodgkins were at Hancock's office at precisely ten minutes after eleven o'clock ; but "the morning was "gone" for them before it began. (Rec., 87-88, 107-109 and 133-134 ; top pages 67-68, 87-89 and 113-114.)

Crane immediately left and went to the District Judge in Chambers and complained of the wrong that had been done him by the provisional assignee, and asked the Judge to stay the delivery of the property until he could get all the facts in the matter. The judge said that he was sorry, but frequent demands had been made for the money and had been refused, and he wanted to close the matter up. To Crane's statement, that the provisional assignee had done wrong and deceived the judge, the latter was incredulous, and refused all redress.

Mr. Crane later that day, in company with his attorney, made another application to the District Judge for relief, and asked him to send for the provisional assignee to come

up and tell the truth about the matter, but was told that the judge did not want the assignee, and " didn't want to hear anything more about the case." (Rec., pp. 32, 33, 94-95; top pages 32-33, 74-75.)

The first application to the District Judge was before the property had actually been delivered by the provisional assignee out of his possession to Conro and Carkin. (Rec., p. 33; top page same.)

There are certain other facts connected with the history of this litigation, as to proceedings commenced, etc., which are briefly, as follows:

On July 30th, Hodgkins filed his petition in the District Court for relief. (Rec., pp. 354, 370.)

On August 9th, Crane and Hodgkins filed their bill and commenced their suit in equity in the Circuit Court for the same relief, the petition in the District Court being abandoned, and this bill in equity being afterwards converted into a petition for review, that suit, as a suit in equity, was dismissed on September 15th. (Rec., pp. 371, 398.)

On August 9th, Crane and Hodgkins obtained leave of the Circuit Court to change their bill in equity into a petition of review under the bankrupt laws. (Rec., pp. 413, 414.)

On August 10th, Hodgkins filed his petition of review in the Circuit Court. (Rec., pp. 414, 415.)

On August 13th, the petition of review came on to be heard by the Circuit Court in Chambers, on ~~application~~ affidavits filed in support thereof, and on behalf of the respondents, and on that day the Court entered the following order: (Rec., pp. 419-421):

" FRIDAY, August 13, 1875.

" Present—the Hon. THOMAS DRUMMOND, Judge.

" In the matter of FOX and HOWARD, BANKRUPTS, petition of JEFFERSON HODGKINS. } *In review under the second section of the Bankrupt Law.*

" On hearing ~~of~~ Mr. Cooper and Mr. Crane for the petitioners, and Mr. Tenney for the defendants, the Court is of opinion that the District Court should not have made an order on the twelfth day of July last, vacating and setting aside the order of said Court, made on the ninth day of the same month, confirming the bid and sale made to Jefferson Hodgkins by the assignee, without giving the said Hodgkins an opportunity to be heard on the same, or Mr. Crane, the party represented as the principal, and for whom Hodgkins was agent, and the District Court is directed to open or set aside the said order made on the twelfth day of July, and to give the said Hodgkins or the said Crane an opportunity to be heard upon the application of the assignee to set aside or vacate the confirmatory order of the ninth of July, aforesaid.

" And it is ordered that in the meantime and until the action of the District Court thereon, all parties to these proceedings do nothing in relation to the property of the bankrupts prejudicial to the rights of the said Hodgkins or of the said Crane. It is ordered that it be certified accordingly to the District Court."

August 18th, petition filed in the District Court by Crane and Hodgkins, under the provisions of the above order of the Circuit Court, to have the order of July 12th set aside, and for other relief, the provisional assignee having neglected to make the application as directed by the order of the Circuit Court. (Rec., pp. 1, 12 and 13, top page same.)

August 18th, rule to show cause issued on above petition, out of District Court, in bankruptcy, directed to Conro,

Carkin, Hancock, Fox and Howard, respondents therein, and served on all except Howard. (*Rec.*, pp. 17-18, top page same.)

August 27th, answer of Hancock to petition filed, stating:

1st. That when the Hodgkins bid was put in he supposed it was in Hodgkins' own right and for his exclusive benefit, *and never heard to the contrary until the sale was vacated.*

2d. That he made repeated demands for the money from Hodgkins, and was refused payment.

3d. That the first time he ever knew or heard of Crane was Saturday, July 10th, when Hodgkins stated that Crane was going to furnish part of the money, and he then called on Crane, who stated in substance that a company was being formed ("of which Henry Fox was to be one") and gave Hancock to understand that whether that company took the property depended on whether the company was formed or not. That Crane "did not say or intimate "that he owned or controlled the bid, *or had any interest "in it* or was bound by it, *or that he would pay the purchase "money.*"

4th. That he did not consider Crane's promise to make a deposit Monday morning as binding upon Crane, and

"In view of these facts, I thought it my duty to find another purchaser if I "could, and I considered it fortunate to get the offer from Conro & Carkin "on the morning of the 12th. That offer was procured by me, not volun- "teered by them. If Crane had offered a sufficient deposit 'the first thing "Monday morning,' I might have accepted it, although I did not consider "myself bound to, but at about eleven o'clock, when I applied for the vaca- "tion of the sale, I considered that that time had fully passed with nothing "done, as I expected it would. I did not suppose there was any rule of law "requring notice of the application to be given to Hodgkins, or testimony to "be formally taken, and that is the only reason why I did not give such "notice."

5th. That he thinks the interest of the estate would be prejudiced, for the following reasons:

That the last bid was the highest and the sale executed;

That the first bid described the property in general terms, and it would be difficult to identify it;

That the property was not in his hands and he couldn't deliver it;

That the property having been delivered to Conro and Carkin, and paid for under the order of court, it was at least doubtful whether their title is not perfect;

That he was advised that it was doubtful whether the Court could take the property from them in a summary way, and if a regular suit should be brought it would cause great delay, and property would be impaired in value before end of litigation, and Crane and Hodgkins would not probably take it;

That the latter had "thus far put up no money, and "they may safely back out at any time. Before they are "heard they should actually pay the amount of their bid "into court."

The answer was verified by the oath of Hancock. (Rec., pp. 18-22; top pages the same.)

September 6th, Crane and Hodgkins paid into the District Court the sum of $40,000, purchase price of the property, having previously tendered the same to the provisional assignee, and the District Judge having required the payment to be made. (Rec., pp. 22-23 and 12-13; top pages same.)

September 13th Conro and Carkin filed their answer in the District Court in return to the rule, in which they set up:

1st. That Crane and Hodgkins have no such right or interest, or standing in Court as entitles them to call Conro and Carkin to account in the premises.

2d. That they, Conro and Carkin, are strangers to the bankruptcy proceedings, except as "*bona fide* purchasers" of the property under the order of the Court; and that the matters in controversy can only be determined at law or in equity, and not summarily, as by rule to show cause.

3d. That, on Sunday, July 11th, one of the respondents having learned that Hodgkins had not paid the amount of his bid on the confirmed order of sale, and that Hancock would recommend bid of respondent—as afterwards made—to Court; respondent made bid and paid money; order of Court was entered; bills of sale and possession of property delivered, and it has ever since been in possession of respondents as their own property.

4th. That there was no combination between respondents and Fox and Howard, or either of them, to procure property for benefit of said bankrupts.

5th. That neither of bankrupts furnished any portion of $40,500, which was advanced by respondents or procured on their credit.

6th. That respondents have no personal knowledge of interviews, agreements, &c., between provisional assignee and Crane and Hodgkins; but, on information and belief, charge that certain statements, &c., (as set forth by assignee in his answer,) are true.

7th. That, on information and belief, Hancock demanded money of Hodgkins on bid, (as stated by Hancock in his answer,) and was refused payment.

8th. That, on July 16th, 1875, a certain contract was awarded by Board of Public Works of Chicago to bankrupts—Fox & Howard—who, on August 1st, dissolved their co-partnership, Fox taking that contract, and agreed to transfer it to respondents and others, who employed Fox, as superintendent, to oversee their work. (Rec., pp. 23-30; top pages, same.)

September 15th. District Court entered an order referring the issues of fact raised by petition and answers of Hancock and Conro and Carkin, (Fox making no answer,) to the Register to take proof thereon. (Rec., p. 30; top page, same.)

November 4th and 5th. Hearing before District Court on testimony taken and returned into court; at the conclusion of which the Court took matter under advisement. (Rec., p. 43; top page, same.)

March 6th, 1876. Decision of District Court on the merits of controversy, and order dismissing petition, at petitioners' costs. (Rec., p. 43; top page, same.)

(Opinion of Court, Rec., pp. 52-70; top pages, 331-343.)

March 9th. Petition of Review filed in Circuit Court by Crane and Hodgkins under Sect. 4986 U. S. Revised Stats., and Rule entered on Conro, Carkin, Fox and Hancock, to appear and answer petition on or before March 18th. (Rec., pp. 1-48. For petition of review, top pages 1-47.)

March 9th. Filed, with petition of review and as a part thereof, were sworn copies of orders of District Court and abstracts of depositions of witnesses taken in the District Court, which are sworn to set forth fairly the substance of such depositions. (Rec., p. 31; top page, same.)

March 18th. Answer of Bradford Hancock, filed: States that the hearing took place before District Court, as stated in petition of review, on petition, answers and testimony, and the Court refused to grant the relief prayed for in the petition: Denies that the other documents embodied in petition of review, or referred to therein, were presented to or considered by District Court: Denies that abstract of testimony filed is a true or sufficient representation of the testimony before District Court: That the testimony itself should be brought up and considered by

Circuit Court: That the true facts are stated in the opinion of the District Court, a copy of which he annexes to his answer, and which he "adopts and propounds as his answer herein."

The answer is not sworn to.

(Rec., p.p 50-70.)

March 18th. Answer of Henry Fox filed to petition of review, states, that in the dismissal of the petition by the District Court there was no error; and that the decision and order of the District Court should be by the Circuit Court affirmed.

Answer not sworn to.

(Rec., p. 73.)

March 18th. Motion of Conro and Carkin filed to dismiss the petition of review. (Record, 71-72.)

1st. Because Circuit Court has no jurisdiction of Conro and Carkin.

2d. Because matters stated in petition are not reviewable under Sec. 4,986, Rev. Stats.

3d. Because petition does not state such a case as is within above section.

4th. Because the matters in controversy could only be brought to Circuit Court, if at all, by appeal, and none had been taken.

5th. Because no transcript of the Record, &c., of District Court, had been filed in Circuit Conrt.

The motion was not verified, and no special action was taken upon it either by Court or counsel.

April 6th. Answer of Conro and Carkin to petition of review filed. (Rec., pp. 74-77.)

April 6th. Hearing of petition of review in Circuit Court, before Hon. THOMAS DRUMMOND, Circuit Judge, in Chambers, at the conclusion of which, the Court took the matter under advisement. (Rec., p. 78.)

April 10th. Decision of the Circuit Court rendered. (See Rec., pp. 427-446, and Printed Supplemental Record filed herewith.)

April 10th. Interlocutory order entered reversing orders of District Court of July 12th, and March 6th, leaving the question—as to whether the property shall pass to Crane and Hodgkins, on the order of July 9th, or be ordered to be re-sold—to stand over for argument and for final order. The interlocutory order is as follows: (Rec. p. 79.)

"Monday, April 10, 1876.

"Present, The Hon. THOMAS DRUMMOND, Judge.

"In the Matter of
"HARRY FOX AND WILLIAM B. HOWARD,
"BANKRUPTS. Petition of Review of
"CHARLES S. CRANE AND JEFFERSON
"HODGKINS. } *Petition for Review.*

"The Court having considered, and being now fully advised upon the merits herein, orders, that the orders of the "District Court of the date of July twelfth and March sixth, "A. D. eighteen hundred and seventy-five, be reversed and "set aside, and the order of this Court, made on the thirteenth day of August, eighteen hundred and seventy-five, "do stand in full force, and it is further ordered, that this be "certified to the District Court."

April 24th. After further argument, the Circuit Court entered its final decretal order from which Conro, Carkin and Hancock, prayed an appeal to this Court. (Rec., pp. 80-82, and Printed Supplemental Record filed herewith, pp. 18-20.)

May 3d. Appeal Bond filed by Conro and Carkin with sureties satisfactory to the Court, and motion by Conro and Carkin to make bond operate as a *supersedeas*, which is by the Court denied. (Rec., pp. 349-351.)

The following is the order indorsed by the Circuit Judge on the bond filed :

"This bond approved as to form and sufficiency of "sureties, but not admitting the right of appeal in this "case, nor that this bond is a supersedeas.

"(Signed) THOMAS DRUMMOND.

"May 3, 1876, CHICAGO."

June 19th. Appeal allowed, and supersedeas granted by the Hon. DAVID DAVIS, Associate Justice of the Supreme Court of the United States.

The following is the further indorsement made upon the appeal bond :

"The appeal prayed in this case being allowed by me, "it is ordered that the within bond be approved, and that "the same operate as a supersedeas.

"(Signed) DAVID DAVIS,

"*Associate Justice of the Supreme Court.*

"July 19, 1876, CHICAGO."

BRIEF.

I.

THE APPEAL IN THIS CAUSE HAVING BEEN TAKEN FROM THE ORDER OF THE CIRCUIT COURT, ENTERED IN THE EXERCISE OF THE "SUPERINTENDENCE AND JURISDICTION OF ALL CASES AND QUESTIONS ARISING IN THE DISTRICT COURT FOR SUCH DISTRICT, WHEN SITTING AS A COURT OL BANKRUPTCY," IT SHOULD BE DISMISSED.

Secs. 4,986, U. S. Rev. Stats., p. 971.
Morgan v. *Thornhill*, 11 Wallace, 65.
Hall v, *Allen*, 12 *Ib.*, 452.
Mead v. *Thompson*, 15 *Ib.*, 635.
Coit v. *Robinson*, 19 *Ib.*, 274.
Sandusky v. *National Bank*, 23 *Ib.*, 289.
Wiswell v. *Campbell*, decided at the present term of this Court.

II.

A SALE OF THE BANKRUPT'S PROPERTY BY THE ORDER OF THE DISTRICT COURT IN BANKRUPTCY, IS COMPREHENDED IN THE TERM, "CASES AND QUESTIONS ARISING IN THE DISTRICT COURT WHEN SITTING AS A COURT OF BANKRUPTCY," AND MAY BE REVIEWED BY THE CIRCUIT COURT FOR SUCH DISTRICT, UNDER SEC. 4,986 OF THE REVISED STATUTES.

In re Alexander, 3 National Bankruptcy Register (octavo), 29.
Knight v. *Cheney*, 5 *Ib.*, 305-312.
In re York and Hoover, 4 *Ib.*, (octavo) 479.
Davis et al., Trustees, v. *Railroad Company et al.*, 13 *Ib.*, 258.
In re The Troy Woolen Company, 4 *Ib.*, 629.
Markson v. *Heaney*, 1 Dillon, 497, and note, p. 511.
Citizens' Bank v. *Ober*, 13 National Bankruptcy Register, 329.

III.

THE JURISDICTION OF THE DISTRICT COURT TO ORDER OR CANCEL ORDERS OF SALES OF BANKRUPTS' PROPERTY IN THE UNDISPUTED POSSESSION OF ITS MARSHAL, MESSENGER OR ASSIGNEE IS A SUMMARY JURISDICTION, TO BE EXERCISED ON PETITION OR MOTION.

Third, Fourth, Fifth and Sixth clauses of Sect. 4972 Rev. Stats., p. 969;
Sec. 5065 *Ib.*, p. 983;
Sec. 4, 18, Stats. at Large, p. 178;
Ray v. *Norseworthy*, 23d Wallace, 134;
Morgan v. *Thornhill*, 11 *Ib.*, 75;
Knight v. *Cheney*, 5 National Bankruptcy Register, 312;

In re Alexander, 3 *Ib.*, (octavo,) 29;
And other cases cited *ante*.

IV.

THE DISTRICT COURTS, SITTING AS COURTS OF BANKRUPTCY, IN THE EXERCISE OF THEIR SUMMARY JURISDICTION ARE GOVERNED BY THE PRINCIPLES APPLICABLE IN COURTS OF EQUITY, IN CAUSES OF LIKE CHARACTER.

Sec. 4975 Rev. Stats., p. 970;
Sec. 4986, *Ib.*, p. 971;
Smith v. *Mason*, 14 Wallace, 430;
Ex parte Christy, 3 Howard, 292;
In re Walshe, 2 Woods, 228;
Bill v. *Beckwith*, 2 National Bankruptcy Register, 242.
In re Mallory, 6 National Bankruptcy Register, p. 22.

V.

WHERE A PERSON BECOMES A PURCHASER OF PROPERTY SOLD BY ORDER OF A COURT OF EQUITY, AT A JUDICIAL SALE, HE THEREBY SUBMITS HIMSELF TO THE JURISDICTION OF THE COURT, AND BECOMES A PARTY TO THE CAUSE AS TO ALL MATTERS CONNECTED WITH HIS PURCHASE, WHICH THE COURT, IN THE ORIGINAL SUIT, MAY SUMMARILY SET ASIDE FOR THE FRAUD OR MISCONDUCT OF THE PURCHASER, OR THE FRAUD OR MISCONDUCT OF ITS OWN OFFICER, "WHICH IT IS "AGAINST CONSCIENCE FOR THE PURCHASER TO TAKE "ADVANTAGE OF." AND THIS WHETHER THE PURCHASE PRICE HAS BEEN PAID, AND THE PROPERTY DELIVERED TO THE PURCHASER OR NOT.

Blossom v. *Railroad Company*, 1 Wallace, 655;

Minnesota Company v. *St. Paul Company*, 2 *Ib.*, 634;
Savery v. *Sypher*, 6 *Ib.*, 157;
Coffey v. *Coffey*, 16 Ill., 141;
Campbell v. *Gardner*, 11 N. J., Eq. Reps., (3 Stockt.), 423.
Collier v. *Whipple*, 13 Wendell, 224;
Requa v. *Rea and Wife*, 2 Paige Ch., 339;
Billington v. *Forbes*, 10 *Ib.*, 487;
Tripp v. *Cook*, 26 Wendell, 143;
Casamajor v. *Strode*, 1 Sim. & Stu., 381;
Rorer on Judicial Sales, § 394, pp. 152–154;
1 Barbour's Ch'y Pr., (1st Ed.,) p. 538, *et seq.*;
2d Daniell's Ch'y Pr., (4th Ed.,) p. 1281, *et seq.*, and notes;

And that the same principle has been invoked and recognized in Courts of Bankruptcy.

Vide:

Davis et al., Trustees, v. *Railroad Company*, 13 National Bankruptcy Register, 258;
In re The Troy Woolen Company, 4 *Ib.*, 629;
Ex parte Lacey, 6 Vesey, Jr., 625;
Ex parte Hughes and ex parte Lyon, *Ib.*, 617;
Ex parte Gould, 1 Gl. & J., 231;
Ex parte Green, 1 Atkyns, 202.

VI.

WHERE A DECREE IS AGAINST SEVERAL PARTIES, ALL OF WHOM PRAY AN APPEAL THEREFROM, BUT THE APPEAL IS PERFECTED AND DOCKETED IN THE SUPREME COURT, IN THE NAMES OF ONLY PART OF THE PARTIES SO PRAYING SAID APPEAL, THE SAME WILL BE DISMISSED.

Deneal v. *Stemp*, 8 Peters. 526;
Wilson's Heirs v. *Insurance Company*, 12 *Ib.*, 140;

Smythe v. *Strader*, *Perrine & Co.*, 12 Howard, 327;
Davenport v. *Fletcher*, 16 *Ib.*, 142;
Ship Protector, 11 Wallace, 82;
Miller v. *McKenzie*, 10 Wallace, 582.

ARGUMENT.

Although the preceding statement of facts is of a length and detail which may be unusual to lay before the Court on a motion of this kind, yet we have no doubt that when the argument of counsel for appellants shall have been filed, the Court will readily see that such facts are conceded on both sides, as will save the Court the labor of a lengthy examination of the record, for the purposes of this motion.

Amongst the undisputed facts in this case are the following :

1st. That all the right or title which Conro and Carkin ever had, or claimed to have, to the property in controversy, they obtained under the order of sale to them by the District Court.

2d. That such order of sale was entered, and the previous order confirming the sale of July 9th, on the Hodgkins bid canceled, without any notice to Hodgkins, or to Crane for whom the bid was made, and without their knowledge.

3d. That appellees, on the morning of July 12th, were the purchasers of the property at a judicial sale, in the bankruptcy of Fox and Howard, made by the District Court, by its orders entered in such bankruptcy matter, and through the medium of its officer acting as messenger; and which sale had been by the Court confirmed.

4th. That Hancock, the officer acting as messenger — no assignee having yet been appointed — procured the Court to cancel the first sale and make the second, on the sole ground that he had demanded the purchase money from Hodgkins, and it had been refused. That whilst Crane was the real purchaser, abundantly responsible for the purchase price, and had promised Hancock to make a deposit on account of the purchase, on the very morning on which the sale was canceled, yet Hancock alleges, as his only ground for suppressing that arrangement with Crane from the District Court, when asking for the cancellation of the sale, that he had found Hodgkins to be irresponsible, and did not know that Crane was the real purchaser who had authorized the bid: That Conro and Carkin *did* know, on the morning of July 12th, that Crane was the real purchaser, and that the bid was his; and at that very time an arrangement was subsisting between them and Crane, by which one or both of them were to take the property, or an interest in it from him when he should get title and possession thereof from the court.

5th. That before the property had actually been delivered out of the possession of Hancock, as the Court's officer, to Conro and Carkin, Crane and Hodgkins made application to the District Court to stay such delivery; and that such application was supported by the same verification, and accompanied by the same notice to Conro and Carkin, as were made and given on the cancellation of the confirmed sale; viz: the unsworn statement of Hancock on the one hand, and the same by Crane on the other, with no notice given in either case.

6th. That the whole controversy has been over those two orders of the District Court of July 9th and 12th, with the claim of title and possession thereunder by the appellants, on the one hand, seeking to support the last

order, assisted by Hancock, representing the estate, claiming that it was for the best interest of the estate that the order stand, and by Fox, one of the bankrupts; and by the appellees on the other hand, coming into Court as purchasers at a judicial sale, confirmed by that Court, and claiming to be entitled to the title and possession of the property by virtue of that confirmation, because the sale to them was canceled without notice to or knowledge by them, at a time when they were in no default, and were entitled to receive the property.

7th. About the facts and law found by the Circuit Court, as to the misapprehensions of the provisional assignee of his duty in the matter; his bad faith exercised toward Mr. Crane in procuring the cancellation of the sale; that neither Crane nor Hodgkins were in any default when the sale to them was canceled; that Crane's conduct had been entirely honest and straightforward from the beginning to the end of the controversy, and the various errors of fact and law committed by the District Court in its opinion and order denying petitioners any relief; we need not take the time to point out to this Court how overwhelmingly such findings are sustained by the record: because we know that this Court will assume the findings of fact and rulings of law of the Circuit Court to be correct on those questions, as the final determination of the Court of last resort, if it had jurisdiction to pass on those questions.

I.

THE JURISDICTION OF THE CIRCUIT COURT TO REVISE THE ACTION OF THE DISTRICT COURT IN THIS CASE IS CONFERRED NOWHERE, UNLESS IT BE BY SEC. 4,986 OF THE REVISED STATUTES.

If the Circuit Court had jurisdiction to enter the order of April 24th, 1876, which is appealed from, then this

Court cannot, under its repeated decisions, entertain this appeal. That much, we assume, will be conceded by our learned adversaries.

We also submit, that if the Circuit Court had any jurisdiction whatever to review the action of the District Court, in refusing the appellees any relief, and dismissing their petition by its order of March 6th, 1876, then the superintending jurisdiction which was invoked in this case, was the proper method of seeking such review.

The only cases in which any different method of revision is given, are in suits at law, or in equity, commenced and terminated in the District Court, and in cases of the allowance or rejection of claims of creditors.*

Manifestly all that could be claimed for this case is, that it was a suit in equity. To say nothing of the entire lack of the proceedings as to form, &c., required in suits in equity, there is one element that was entirely wanting in this case in the District Court, to give that court jurisdiction of it as a suit in equity. Here there was no claim made by the appellees against "an assignee in bank-"ruptcy, touching any property or rights of the bank-"rupt transferable to or vested in such assignee." †

There was no "assignee in bankruptcy" at all, and the provisional assignee makes no claim to the property whatsoever; but, on the contrary, disclaims any right to it.

Not only this, but the real parties in interest in this cause are Conro and Carkin on the one hand, and Crane and Hodgkins, on the other. If that is not the case, and the provisional assignee was a necessary party to the suit, then this appeal must be dismissed because he is not one of the parties to it, and there is no evidence in the record that he refused to join in the appeal. True, he joined in the appeal on April 24th, as stated at the foot of the order

*Morgan vs. Thornhill, 11 Wallace, 78.
†Sec. 4,979 Rev. Stat., p. 970.

appealed from, but no order was entered allowing the appeal, until June 19th, at which time he had been dropped from the appeal; how or when the record does not state; and he is not now a party to the appeal in this Court.*

This Court, however, has left the construction of the statutes in no manner of doubt as to what must be the character of the parties, to give the District or Circuit Courts jurisdiction of a suit in equity or action at law.

"Controversies, in order that they may be cognizable, "under that clause of the section, either in the Circuit or "District Court, must have respect to some property, or "rights of property, of the bankrupt, transferable to, or "vested in, such assignee; and the suit, wheter it be a suit "at law or equity, must be in the name of one of the two "parties described in that clause, and against the other. "All three of those conditions must concur to give the "jurisdiction." †

As the three conditions did not exist in this case, it follows that the proceedings in the District Court were not a suit in equity, and, hence, could not be removed into the Circuit Court for re-examination, by appeal, under Sect. 4,980, Rev. Stats., or in any other manner, except the very method which was adopted. *Vide*, also, *In re Alexander*, *In re York and Hoover*, *In re The Troy Woolen Mills*, cited in brief of authorities *ante*.

II.

THE ACTION OF THE DISTRICT COURT IN ENTERING ITS ORDER OF JULY 12TH, CANCELING THE ORDER OF JULY 9TH, WHICH CONFIRMED THE SALE ON THE HODGKINS BID, WAS SUBJECT TO REVISION BY THE CIRCUIT COURT.

Had there not been so much contention for the converse of the above proposition in the courts below by our able

* Masterson vs. Herndon, 10 Wallace, 416.
Miller vs. McKenzie, Ib., 582.
† Morgan vs. Thornhill, 11 Wallace, 75.

adversaries, we should not consume much time in its discussion. They insist,

1st. That under the section of the statute giving the assignee power to sell the property of the bankrupt on such terms as he thinks most for the interest of the creditors, with power of the Court to make such order concerning the same, as in its opinion will prove most to the interest of creditors;* and the amendment to the Bankrupt Act, giving the Court complete supervisory power over certain sales of the bankrupt's property;† it was, the intention of Congress, in enacting the Bankrupt law and the amendment thereto, to confine all matters of sale of bankrupt's property exclusively to the discretion of the assignee, to be be subject only to the supervision of the District Court.

Sec. 5,062, Rev. Stats., which is the one relied upon, is as follows:

"The assignee shall sell all such unincumbered estate, "real and personal, which comes to his hands, on such "terms as he thinks most for the interest of the creditors, "but upon petition of any persons interested, and for cause "shown, the Court may make such order concerning the "time, place, and manner of sale, as will, in its opinion, "prove to the interest of the creditors."

The "Court" referred to in the above section, we apprehend, is the District Court sitting in bankruptcy, from whose action a right of revision by the Circuit Court is expressly given of "*all* cases and questions" arising in bankruptcy in the District Court, at the instance of any party aggrieved.

Is not, whether a sale of the bankrupt's property shall stand or not a "case" or "question"?

And what matters in bankruptcy would be subject to re-

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*Sec. 5,062, Rev. Stats., p. 983.
†Sec. 4, 18 Stats. at Large, p. 178.

vision by the Circuit Court, if, in every case where the word "Court" is used in the Bankrupt Act, it were to be held, as contended, that the District Court only was meant, and that it was thereby made the court of last as well as first resort?

In addition to this, there was here no "assignee," and the sale was not made under that section at all. The sale was made under the following section, * as well as under the provisions of one of the General Orders in bankruptcy established by this Court.†

"When it appears to the satisfaction of the Court that "the estate of the debtor, or any part thereof, is of a per- "ishable nature, or liable to deteriorate in value, the Court "may order the same to be sold, in such manner as may "be deemed most expedient, under the direction of the "messenger or assignee, as the case may be, who shall "hold the funds received in place of the estate disposed "of."

The amendment to the Bankrupt Act relied upon, so far, as material, is as follows: ‡

"That unless otherwise ordered by the Court, the as- "signee shall sell the property of the bankrupt, whether "real or personal, at public auction, in such parts or par- "cels, and at such times and places as shall be best cal- "culated to produce the greatest amount with least ex- "pense. All notices of public sales under this act, by any "assignee or officer of the court, shall be published once "a week for three consecutive weeks in the newspaper "or newspapers, to be designated by the judge, which, "in his opinion, shall be best calculated to give general "notice of the sale. And the Court, on the application "of any party in interest shall have complete supervisory "power over such sale, including the power to set aside

* Sec. 5065 Rev. Stats, p. 983.
† XXII General Order in Bankruptcy.
‡ Sec. 4, 18 Stats. at Large, 178.

" the same, and to order a re-sale, so that the property " sold shall realize the greatest sum."

Whether the above amendment is applicable to the sales in this case, may be a question. If it is, and the two sales in controversy were made so as to bring them both within the " complete supervisory power " of the court, then that would dispose of the objection to the summary jurisdiction of the court, which has been most strongly urged in this case.

Upon an examination of the section, however, it may well be doubted whether it is of application here. The section provides for sales " at public auction," " unless oth- " erwise ordered by the court;" the next sentence provides that all " notices of public sales under this act " shall be advertised in a certain manner; and the next gives the court " complete supervisory power over *such* sales."

Now, this was not a sale at public auction, but was " otherwise ordered by the court," at the express request of the provisional assignee. If this Court shall hold however that the sales in question fall within that section, then it gives additional weight to the claim of jurisdiction. In any event, there cannot be the least question, it seems to us, that whilst the Court referred to in the section is the District Court, it is still that Court subject to have its action revised by the Circuit Court on review, on a proper case being made for such revision.

" Manifestly the construction assumed by the respond- " ent is one which can not be sustained, as it would defeat " the obvious intention of Congress, which was to subject " *every ruling, order and decree of the District Court* in " such cases to the re-examination and revision of the " Circuit Court." *

The counsel have also much relied upon a decision of

* Mr. Justice CLIFFORD: In Littlefield v. Canal Co., 4 Bank'y Reg., 258, (Octavo.)

the Supreme Court of Massachusett * construing a section of the Insolvent Law of that State giving to the Supreme Court substantially the same superintendence and jurisdiction over matters in insolvency, which are conferred upon the Circuit Courts by section 4,986 over matters in bankruptcy. It was a case where an assignee of certain insolvents had made a compromise with a debtor to the estate, and had been allowed certain compensation for his own services.

The insolvents filed a bill in equity to review those matters in the Supreme Court. It was not claimed that the acts complained of were fraudulent, or in violation of law. The Supreme Court dismissed the bill, not because it did not have jurisdiction, but because the acts complained of were mere matters of expediency confided to the judgment of the assignee under the direction of the commissioner of insolvency. In other words, the court in dismissing the bill was governed by a rule of decision, and not by a question of jurisdiction, as will be seen by the following extract from the opinion of the court, which we submit is important in upholding the very jurisdiction which the counsel for appellees contend for in the case at bar.

" The Court, therefore, will always intervene, of course, " upon the proper application of parties liable to be injuri- " ously and wrongly affected by the exercise of authority, " or the doing of acts not warranted by law. But it will not " interfere, or exercise any of its extraordinary powers to " regulate or control the arrangement of affairs, the proper " disposition of which rests upon considerations merely of " expediency and probable advantage. These, so far as " an assignee is concerned, being only matters of detail, " if within the limit of authority conferred, will not be in- " terrupted or disturbed, if approved of by the Commis- " sioner of Insolvency. The compromise and settlement

* Richards v. Merriam, 11 Cushing, p. 58.

" with Phillips and Mosely made by the assignee, which is " complained of in the bill, is exactly of this character, and " comes within this description. He was expressly em- " powered and allowed by the statute to do acts of that " kind. He did it under the direction and with the approba- " tion of the commissioner. The *bill does not suggest that* " *it was collusive, fraudulent, or in any respects in violation* " *of law.* On the contrary, *its legality is conceded*, and it is " only complained of as having been less beneficial and " advantageous to other parties than a different course of " proceedings might have been, or might still be, if this " Court should interfere to annul it."

2d. The next point which counsel make against the jurisdiction of the Circuit Court in this case is, that it could not set aside the order of sale to Conro and Carkin, because the latter, having paid their money, and obtained possession of the property under the order of sale to them before the first petition of review was filed; therefore, no action could afterwards be taken by the Circuit Court to disturb the rights which had already become vested in them under the order of the District Court. That is to say, Conro and Carkin could go into the District Court on the morning of July 12th, and procure an order of sale of property already sold to Crane and Hodgkins, of which the former had full knowledge; and as to whether the Circuit Court would have jurisdiction to hear the complaint of the parties aggrieved, so as to afford them any effectual remedy, would depend upon the fact whether, in the race of diligence, Crane and Hodgkins could lodge their petition of review in the Circuit Court before Conro and Carkin could receive the possession of the property from the superserviceable provisional assignee!

And it is contended, further, in support of the objection, that this case is analogous to a purchase at a judicial sale

of property under a judgment or decree, where, the judgment or decree being afterwards reversed by the appellate court, a *bona fide* purchase thereunder made when the judgment or decree was in full force, will not be disturbed. Therefore, Conro and Carkin having purchased under the order of sale of July 12th, when it was unreversed and not appealed from, could not be disturbed in their right and title acquired under that order by its subsequent reversal by the Circuit Court on the first petition of review, and by the order appealed from.

There are two most conclusive answers to this question.

First: The purchase of Conro and Carkin was not *bona fide.* It was procured by dishonest conduct on the part of the officer of the Court, "which," in the language of Lord ELDON, in *ex parte* Lacey, "it is against con- "science for the purchaser to take advantage of"; and by the dishonest conduct of the purchasers themselves.

Second: The analogy does not apply. This has been so conclusively pointed out by the learned Circuit Judge, that we need say nothing further, except to quote from his decision in this case:

"But, it is claimed that because when a judgment or decree is rendered, "and a sale takes place under it, and a writ of error or appeal is taken to a "higher court, and the judgment or decree reversed, and that does not "impair the validity of the sale, the same rule applies here.

"That principle is well established. Why? Because the question is not "there, as to the validity of the sale, but as to the validity or right of the "decree or judgment. It is the decree or judgment that may be set aside "and not the sale.

"In this case, the very words of the order of sale, *ipsissima verba*, are "the subject of controversy; whether the sale should stand as the order of "the District Court. It is not a sale made under a decree of the District "Court, but it is the order of sale itself by the District Court, in an ordinary "bankruptcy proceeding, and the question is—whether this sale shall stand? "I insist, in all such cases, the purchaser takes the property, if delivered "over to him, and he pays the money, subject to the supervisory power of "the Circuit Court over the sale." *

* Supplemental Printed Rec., p. 15.

We desire also to refer this Court to the very able opinion of one of the learned Justices of this Court, delivered upon the circuit already quoted from, ~~when~~ where the identical question in principle was raised. Creditors of a bankrupt opposed his discharge, and the District Court sustained the objection. Whereupon, the bankrupt applied by petition of review to the Circuit Court to reverse that action, and grant the discharge. *Inter alia* it was urged before the Circuit Court by the creditors that their right to hold and dispose of their claims against the bankrupt and maintain actions at law upon them, had before the petition of review was lodged in the Circuit Court, vested in the respondents.* The Court ~~disproved~~ disposed of that objection as follows:

" As to the fourth objection, power of Congress to pass the Bankrupt Act " is not questioned, and it is equally clear that Congress may create a special " tribunal to execute it, or may confer that jurisdiction upon the District and " Circuit Courts, created by the Judiciary Act. Decrees of the District " Courts are final in the constitutional sense, although they were rendered " under an act of Congress which makes them subject to revision by the Cir- " cuit Court, and consequently the right of such revision is not inconsistent " with the interest, which the opposite party acquires in the decree " rendered, as the decree is subject to legal revision in the Circuit " Court, no party acquires or can acquire any interest in the decree to defeat " the right of such revision. Argument upon this topic is unnecessary, as " the final judgments and decrees of every subordinate court are rendered " subject to re-examination and revision upon due proceedings in the court of " paramount jurisdicrion."

The same principle was acted upon by another of the learned Justices of this Court in a cause† removed to the Circuit Court under the superintending jurisdiction which was exercised in this case. A sale had been ordered by the District Court of a railroad, as perishable property. The purchasers—it would seem from the report—took possession of the property and reorganized the railroad company. A petition was then filed in the Circuit Court

* Littlefield v. Canal Company, 4 National Bankruptcy Register, p. 260, (Octavo.)
† Davis et al., Trustees. v. Railroad Company et al., 13th National Bankruptcy Register, 258.

for a review, *inter alia*, of the order of sale and to have the same set aside, on the ground, amongst others, that the property had been illegally taken from the posession of the petitioners by the order of the District Court, and the Court so held, decreeing that the sale be set aside: " Sat-" isfied that the order and the sale made in pursuance of " it, were both illegal, I can see no difficulty in decreeing " them both to be void."

As to the importance of the revisory jurisdiction by the Circuit Court to protect the rights of all parties to sales of bankrupt's property, it is unnecessary to suppose cases ~~when~~ where the contrary doctrine would work great hardship and injustice.

This case, with its attendant circumstances, is its own best illustration.

III.

THE DISTRICT COURTS SITTING IN BANKRUPTCY, IN THE EXERCISE OF THEIR SUMMARY JURISDICTION, HAVE POWER TO MAKE SALES OF PROPERTY BELONGING TO ESTATES OF BANKRUPTS, AND TO SET ASIDE SUCH SALES.

The statute leaves the jurisdiction of the District Courts over sales of bankrupts' property in no manner of doubt.

The 5th clause of Sec. 4,972, Rev. Stats. (p. 969) provides that the jurisdiction of the District Courts in bankruptcy shall extend " to the marshaling and *disposition* of " the different funds and *assets, so as to secure the rights of* " *all parties*, and due distribution of the assets among all " the creditors."

The fourth clause of same section and page : " To the " adjustment of the various priorities and conflicting in-" terests of all parties."

And the sixth clause of same section and page: "To "all acts, matters and things to be done under and in vir- "tue of the bankruptcy, until the final distribution and "settlement of the estate of the bankrupt and the close of "the proceedings in bankruptcy."

In this case the sale was made by the Court through the provisional assignee, who simply acted in place of the marshal or messenger, as the Court's agent, and the sale as made in the case at bar clearly comes under the provisions of Sec. 5,065, Rev. Stats., p. 983, already quoted.

It is most manifest that in this case the sale was made by the Court, (which was the vendor) of the bankrupt's property, in the custody of the Court, under the direction of the provisional assignee, who had no statutory power whatever in the matter, no more than the marshal would have had when in temporary possession of the property holding it under a provisional warrant of seizure, until the question of the bankrupts' adjudication should be determined.

Then, having full power to sell the property in a summary manner, has the District Court jurisdiction to set aside or modify its order of sale in the same manner on a proper case being made?

This brings us to the question as to the nature of the summary jurisdiction of the bankrupt court. And it is clear, from many provisions of the bankrupt act, that the jurisdiction is an equitable one, to be exercised in the same manner as summary proceedings in equity.

Sect. 4975 United States Rev. Stats., p. 970, provides as follows: "The district courts, as courts of bankruptcy, "shall have full authority to compel obedience to all orders "and decrees passed by them in bankruptcy, by process "of contempt, and other remedial process, to the same

" extent that the circuit courts now have in any suit pend-
" ing therein in equity."

The power to enforce its orders being the same vested in a court of equity, it would seem to be a reasonable interpretation that the *rule* of its decision should, in the absence of express enactment, be the *principles* governing courts of equity.

But the positive provisions of the law do not stop here. The only review allowed from the decision of the District Court made in the exercise of its summary jurisdiction in bankruptcy is under Sec. 4986 Rev. Stats. That section declares that the principles and practice under which the review shall be heard by the Circuit Court shall be the same " as in a court of equity."

It would be a most remarkable construction of this law to hold that the rule of decision is one thing in the District Court and an entirely different thing in the appellate court.

For instance, suppose a creditor to hold a lien upon the property of the bankrupt, which can only be recognized in a court of chancery, as an equitable lien; or to claim the benefit of an equitable set-off, neither of which can be recognized by the strict principles of a court of law. He files his petition in the District Court, claiming the benefit of his lien, or set-off, and that court having no equitable powers—as claimed by counsel—denies the relief sought, *and this without error on the part of the court.* The defeated party appeals to the Circuit Court by petition for review, and that court being expressly vested by statute with the powers of a court of chancery, and required " to hear and determine the case as in a court of equity," straightway reverses the action of the District Court, and gives the petitioner the benefit of his equitable lien, or set-off, and directs the District Court to carry out the order!

That it undoubtedly would have been within the jurisdiction of the court to entertain a motion or petition in the original suit—had this controversy arisen in a court of equity—on the part of Crane and Hodgkins, and against Conro and Carkin, to set aside the order of sale to the latter, compel them to restore the property, and vest title and possession in Crane and Hodgkins, this Court, by its decisions—cited in our brief of authorities—has placed beyond a question.*

This Court has already intimated that "the rule of decision" by which the District Court "is to be governed" in the exercise of its summary jurisdiction in bankruptcy, is the rule of courts of equity;† and that matters in bankruptcy—where the Court had summary jurisdiction—could be heard as "in a collateral proceeding in a court of "equity." ‖

Mr. Justice BRADLEY, in deciding *In re Walshe*‡ on the Circuit, held:

"The court of bankruptcy has all the powers of a "court of equity, and proceeds summarily, untrammeled "by the ordinary rules of procedure."

We therefore submit that the District Court did have ample authority to entertain this controversy, both over the subject matter and the parties respondent.

It has been urged, however, in the courts below, and will probably be insisted in this Court, on behalf of Conro and Carkin, that this controversy, being between two rival purchasers of the bankrupt's property, in which the estate was not interested, the District Court as a court of bankruptcy should not entertain it; but the parties should be sent to litigate those matters elsewhere. This objec-

* Blossom v. Railroad Company.
Minnesota Company v. St. Paul Company.
Savery v. Sypher
And *vide* other authorities cited ante, pp. 26–27.
† Morgan v. Thornhill, 11 Wallace, p. 73.
‡ 2 Woods, p. 228.

‖ Smith vs Mason 14 Wallace pp 430.

tion, it seems to us, goes rather to the discretion and rule of decision of the District Court than its jurisdiction. But if the objection even goes to the jurisdiction of the Court, is it not utterly untenable? In the first place, as to the fact:

The provisional assignee, assuming to represent the estate, has constantly claimed and insisted that the sale to Conro and Carkin was more valuable to the estate than the other, and has sought to maintain the sale to them on that pretended ground.

In the next place: If the District Court could not be put in motion as a court of bankruptcy at the instance of Crane and Hodgkins, then they were without any relief anywhere. That both the Circuit and District Courts were without jurisdiction in an action at law or suit in equity to determine this controversy, under the Bankrupt law, we submit, has been conclusively shown. To commence a suit in any other court would have been fruitless. This has been clearly pointed out by the learned Circuit Judge in his opinion in this case.*

"I have considered this case independent, so far, of the rights of the pur-
"chasers. It is true that Conro and Carkin made a bid subsequently at the
"request of the assignee, and they paid their money into court, and the
"property was delivered over to them."

"It is claimed, because that was done, this court has no power over this
"sale—in other words, that the parties who may be affected by this sale and
"this act of the District Court, are obliged to go in a Court of Chancery and
"file their bill. How could they do that without admitting the validity of
"the sale, or without taking the confirmation to Conro and Carkin, as vest-
"ing in them the title to this property? That was the objection made to the
"filing of a bill in chancery—which it was thought could not be done so
"long as there was the order of the District Court standing, confirming the
"sale to Conro and Carkin."

But the District Court, as a Court of Bankruptcy, has full power to entertain and dispose of just such a litigation as this. When it is admitted that the District Court

* Supplemental Printed Rec., pp. 14–15.

has ample power conferred upon it by law to make sales of bankrupts' property, the further power to complete such sales, protect the purchasers in their rights acquired by the purchase, redress the wrongful acts of its own officer, or any third person, in violation of the rights acquired by the purchasers, (at least so far as these wrongs were committed by the action of the court itself through fraud and imposition upon it,) would ordinarily follow as an incident to the jurisdiction to make such sales.

But the law itself leaves the matter in no manner of doubt. This power is comprehended in the jurisdiction to dispose of the assets of the bankrupts in such a manner "as to secure the rights of all parties," as conferred by the 5th clause of Sec. 4972, Rev. Stats.

In this case Crane and Hodgkins were purchasers of a part of the assets of the bankrupts, at a confirmed sale made by the court. They thereby became vested with certain rights in this property, viz.: the right to receive the possession of, and bills of sale showing title to, it, on the payment of the purchase price. Those rights were illegally attempted to be taken away through the medium of the court's own records by canceling the confirmation of sale to them, and making a new sale and delivering possession to other parties by fraud and imposition upon the court itself, to which its own officer and the subsequent purchasers were parties. Can the doctrine be tolerated for one moment that the court thereby lost control over its own records, and became powerless to redress the wrong done?

If such were the law, who would become purchasers at a sale of bankrupts' property? We have supposed that the rule prevailed in all courts having power to make judicial sales of property in their possession, to protect *bona fide* purchasers in their right of title and possession to the uttermost, in order to give stability to such sales, and

thereby make it an inducement for persons to compete in bidding thereat, and more especially that such courts would prevent any fraud or imposition upon their purchasers, in dealing with the court itself.

But the power given by the statute over such a sale does not stop at the clause already referred to.

It may be very well comprehended under the third clause of the same section as a power to ascertain and liquidate a " specific claim " on the property.

Or under the fourth clause giving the court power to adjust " the conflicting interests of all parties."

Or under the sixth as " acts, matters and things to be " done under and by virtue of the bankruptcy."

By the amendment of June 22, 1874, already quoted, and which counsel for appellants have insisted applied to this case, the court is given " complete supervisory power over such sales " on the application " of any party in interest," " including the power to set aside the same," etc. If that section of the amendment of 1874 *does* apply here, then it seems to us to dispose of this objection unless it be that by virtue of the amendment the District Court had ample jurisdiction to set aside a sale only where the purchasers were Crane and Hodgkins, but none whatever where they were Conro and Carkin!

The power to set aside such sales on the application of any party in interest being conceded, then the only question is—*were Crane and Hodgkins such " parties in interest ?* "

It has been claimed on the other side that if it was of no importance to the estate of the bankrupts which party obtained the property, then the District Court sitting in bankruptcy, could not entertain the litigation; because the expressions " parties " and " parties in interest," as used in the several clauses of the first section of the Bankrupt Act, mean creditors of the bankrupt or the assignee.

To this we answer: That whilst it may be true, considering the purchase price from both parties to be equally valuable for the estate, that the amount of money obtained for the creditors is the same whichever party gets the property, yet the estate *is* interested in seeing that an honest purchaser is not defrauded out of his purchase, by the act of the agent having it in charge, and the court as administering that estate, and its provisional assignee, are equally interested in that question. Crane and Hodgkins being defrauded out of the title and ownership of the property, were entitled to pecuniary recompense out of the very estate, for all legal damages sustained at the hands of the officer who was administering it, and the creditors of that estate had just as much pecuniary interest in seeing to it, that the wrongful and illegal act of their representative, by which a third person sustained legal damages, should not be ratified by his principal, the court, and creditors, as any other person, who may be liable for damages for the wrong of his agent, if he shall ratify that wrong.

Nay, more; we insist that the court, by the very principle underlying its jurisdiction, and in accordance with which it was constituted, must necessarily be invested by the law-making power with jurisdiction to remedy such a wrong perpetrated by its own act, and that it will do so *ex debito justitiæ*, if for no other cause whatsoever. It would be monstrous to suppose that Congress had erected a judicial tribunal whose principle is to care for one class of persons, leaving all others who are brought before it remediless for any fraud, imposition or wrong-doing they sustain at its hands, or through its instrumentality.

To hold, as has been contended by our learned adversaries, that the court could only be put in motion to redress a wrong done a purchaser under the provisions of the law already quoted, at the instance of creditors or the

assignee—that they are the "parties" meant—would be to exclude all except that class under the 4th clause of Sec. 4972, which requires the court to adjust the various priorities and conflicting interests "of all parties"; whereas the court is expressly given jurisdiction by the preceding clause—the third—to ascertain and liquidate the liens and other specific claims on the bankrupt's property. And it often happens that two persons claim a lien on the same property of the bankrupt in the custody of the court, each of them contending that his own lien is prior to the other and must be first satisfied out of the proceeds. Neither of them are creditors of the bankrupt, and the liens being each valid, of course it can make no difference to the assignee or creditors which prevails.

Is there any doubt, or is the statute open to construction on the proposition that both of these parties can come into the bankrupt court and insist that its machinery shall be set in motion to determine the controversy? The books are full of just such cases, and no one, so far as we have heard, has ever before questioned the jurisdiction of the court to determine that kind of a controversy. If these persons are "parties," or "parties in interest," so also are Crane and Hodgkins in this case.

Besides, as we have shown, the District Court, being governed by the rules of courts of equity in the exercise of its summary jurisdiction, Crane and Hodgkins, it must be conceded by those rules, in becoming purchasers under a confirmed sale, thereby became parties to the proceeding, and submitted themselves to the summary jurisdiction of the court as to that purchase, just as Conro and Carkin did; and they were entitled to demand that the court should protect them in their rights under the purchase.

In addition to all this, it is a fair statement to make of the case, that Crane and Hodgkins *did* have a controversy with the estate and the Court through the provisional as-

signee, their representative. It was important that this assignee should execute to them the bills of sale which the Court had directed in its order of July 9th. They had a right to proceed against him for this purpose, as well as against Conro and Carkin for the possession of the property.

One branch of the controversy was with the Court, which had made a completed contract of sale to Crane and Hodgkins, and had wrongfully rescinded it through the misrepresentations of its own officer.

Yet, concede the position of our adversaries, and it follows, as the night the day, that the Court had no power to even correct its own records and restore the first order of sale which it had unjustly canceled through the fraud of its officer. It cannot be that any position involving, logically, such conclusions, is sound or tenable.

If it be conceded that the Court might entertain a proceeding on the part of Crane and Hodgkins, so far as to correct its own records, and set aside the subsequent sale to Conro and Carkin; then the right to go further and administer the full relief granted by the order of the Circuit Court, would most necessarily follow as an incident to the jurisdiction conceded. The sale to Conro and Carkin being canceled, and that to Crane and Hodgkins restored, the possession of the property would remain in the former, with no right or title thereto. That possession would necessarily revert to the officer of the Court, and the property would be *in custodia legis*, so that the Court might complete its sale and receive the purchase money from the real purchasers. A contrary doctrine would lead to this result. Suppose, pending the election of the statutory assignee in this case, Conro and Carkin had made application to the Court, through its officer, Mr. Hancock, for a lease of this property on certain terms, and to cancel a prior lease to Crane and Hodgkins, and the Court had

entered an order granting the application and canceling the prior lease without notice to Crane and Hodgkins and directed its officer to make such new lease and deliver possession thereunder.

This having been done, and afterwards it appearing to the court, on the application of Crane and Hodgkins, that it had been imposed upon by its officer in terminating the former and granting the new lease, it reverses its action, and directs the property to be restored to Crane and Hodgkins. Can there be any doubt of the complete jurisdiction of the court over the parties and the property in such a case? And is the case at bar any different in principle?

If it be said that when the appellants obtained the title and possession of the property from the District Court, they took the same as their own, absolutely; we answer, that they took it under certain conditions, amongst which were the affirmance or disaffirmance of such sale and delivery of possession by the tribunal of paramount jurisdiction—the Circuit Court—on the application of the appellees or any creditor of the estate. They took it subject to the condition that it had been acquired honestly, and in good faith, both on their part and on that of the officer of the court through whom they made the application.

The first condition failed, on the 13th day of August, 1875, when the Circuit Court, on the first petition of review, (with these parties before it, submitting at that time to its jurisdiction without question,) ordered the District Court to set aside, or open, the sale to appellees, and let Crane and Hodgkins in to be heard on the question as to whether the sale to them should be canceled, and that to Conro and Carkin made or not. From thence onward up to the final order of the Circuit Court of April 24th, 1876, Conro and Carkin were holding the naked

possession of the property as mere custodians of the court, with no title whatever thereto, and subject to the final judicial determination of the second question, upon which depended whether they should obtain title to the property, or should surrender back the possession. That question having been determined against them, by the judicial judgment of the court of final jurisdiction, how can they insist that the court has not complete control over the property, any more than an assignee in bankruptcy could?

which we contend for was

The principle announced by this Court in the decision of another cause,* where it was sought, by supplemental bill, to correct an abuse of the orders of the Court on the part of certain purchasers of a railroad, sold at Marshal's sale under a decree of the Court, and the purchasers made the same objection in principle there, which the appellants do here, that they were not parties to the original controversy, and being citizens of the same State as the complainants, the Federal tribunal could not entertain jurisdiction over them as parties to the controversy; but this Court held otherwise, and that the Court could reach, not only the persons in whose name the purchase was made, but those for whom they were acting as agents.

"An unjust advantage has been obtained by one party "over another by a perversion and abuse of the or- "ders of the Court, and the party injured comes "now to the same Court to have this abuse corrected, "and to carry into effect the real intention and decree of "the Court, and that while the property which is subject "to contest is still within the control of the Court and "subject to its orders. It is objected that Pratt and White "and the Milwaukee and St. Paul Railway Company were "not parties to that suit, and cannot therefore be com- "pelled to yield their right to litigate with a citizen of

* Minnesota Company v. St. Paul Company, 2 Wallace, pp. 633-634.

" Wisconsin in the courts of that State. Pratt and White " are mere nominal parties, who were the agents and at- " torneys of the corporators composing the Milwaukee " and St. Paul Railway Company, and purchased the " property at the Marshal's sale, for them. They and " the Company may both be considered as purchasers at " that sale; and it is in their character of purchasers, and " on account of the possession which they obtained on pe- " tition of the Company, and the rights they claim under " that purchase, that they are now brought before the " Court. If the Court has jurisdiction of the matters " growing out of that sale, and the order of possession, " as we have already shown that it has, then it has juris- " diction, to that extent, of these parties, without regard " to citizenship. *It would, indeed, be very strange if these* " *parties can come into Court by petition, and get possession* " *of that which was the subject of litigation, and then, when* " *the wrong they have done by that proceeding is to be cor-* " *rected, they shall be permitted to escape by denying that* " *they were parties to the suit.* In the case of *Blossom* v. " *The Milwaukee and Chicago Railroad Company*, this " matter was fully discussed, and it was there held, that a " purchaser or bidder at a Master's sale subjected him- " self *quoad hoc* to the jurisdiction of the Court, and be- " came so far a party to the suit by the mere act of mak- " ing a bid, that he could appeal from any subseqent or- " der of the Court affecting his interest."

IV.

AN APPEAL TO THIS COURT MUST BE DISMISSED WHEN IT IS NOT PERFECTED AND DOCKETED IN THIS COURT IN THE NAMES OF ALL THE PERSONS PRAYING THE APPEAL.

The facts about the taking of this appeal, so far as we can state them, in the absence of the record from the place

where this brief is written, (having only an index to the Record filed in this Court, and a printed copy of the Record and Decree used in the court below,) are as follows: When the order or decree appealed from was entered, on April 24th, the present appellants and Bradford Hancock prayed an appeal, which was entered at the foot of the decree,* but there was no order entered by the Circuit Court, allowing the appeal.

On May 3d, Conro and Carkin filed their appeal bond with certain sureties, and the bond was approved by the Circuit Judge as to form and sufficiency of sureties, " but " not admitting the right of appeal in this case, nor that " this bond is a supersedas." †

On June 19th, his Honor Justice Davis allowed the appeal prayed, and ordered that the appeal bond should operate as a supersedeas. ‡

From the fact that the citation served upon the appellees is in the name of Conro and Carkin alone as appellants, and that the appeal bond was executed by them solely as principals, we assume that the cause has been docketed in this Court in the name of Albert Conro and Willard S. Carkin, as sole appellants.

Assuming that such is the state of the Record, then, under the decisions of this Court—to which we need not further call the attention of the Court other than the same are cited in our brief of authorities *ante*—this appeal must be dismissed, because Bradford Hancock is not one of the appellants in this Court.

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* Rec., p. 82.

† Rec., pp. 349-351.

‡ Rec., p. 351.

Respectfully submitted.

JOHN S. COOPER,

Of Counsel for Appellees.

CHICAGO, Jan'y 29, A. D. 1877.